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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. **76-180**

HENRY SMITH, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; CAROLYN PARRY, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and Assistant Adminis-

(Additional parties listed on next page)

On Appeal from the United States District Court for the Southern District of New York

(Three Judge Court)

JURISDICTIONAL STATEMENT
OF NEW YORK CITY APPELLANTS

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Appellants-Defendants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

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Appellants-Defendants,

(Additional parties listed on next page)

On Appeal from the United States District Court for the Southern District of New York (Three Judge Court)

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS;
DOROTHY NELSON SHABAZZ; and LILLIAN
COLLAZO, on behalf of themselves and all
others similarly situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO,
and CHERYL, PATRICIA, CYNTHIA and CATHLEEN
WALLACE on behalf of themselves and all
others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUAL-
ITY AND REFORM, MADELINE SMITH, RALPH and
CHRISTINE GOLDBERG, and GEORGE and DOROTHY
LHOTAN, on behalf of themselves and all
others similarly situated,

Appellees.

JURISDICTIONAL STATEMENT
OF NEW YORK CITY APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an order and
judgment entered on April 14, 1976, by a
Three Judge Court for the Southern Dis-
trict of New York which declared Sec-
tions 383(2) and 400 of the New York So-

cial Services Law and a regulation promulgated thereunder, 18 N.Y.C.R.R. §450.14, as presently applied, to be in violation of the constitutional rights of foster children in the certified class. The order enjoined the defendants from removing or authorizing the removal of any foster children from foster homes in which they have lived continuously for more than one year without notice and hearing at which the foster parents, the foster child and the biological parents could present evidence.

On May 24, 1976, this Court stayed the enforcement of the order and judgment of the Three Judge Court pending the docketing of the appeal. A copy of the stay is appended hereto as Appendix A.

OPINION BELOW

The majority opinion of the three

judge court is reported at 411 F. Supp. 1144. Judge Pollack's dissenting opinion is not reported in the official reports. Both the majority and the dissenting opinions are set forth in the Joint Appendix attached to the Jurisdictional Statement of the New York State appellants.

JURISDICTION

The judgment and order of the Three Judge Court of the District Court for the Southern District of New York was filed on April 14, 1976. The New York City Appellants filed a Notice of Appeal to this Court on June 9, 1976. The Notice of Appeal is annexed hereto as Appendix B. Jurisdiction is conferred on this Court by 28 U.S.C. §1253, this appeal is of an order and judgment of a three judge court granting a permanent injunction and declaring unconstitutional state statutes

and regulations having statewide applicability.

STATUTES AND REGULATION INVOLVED

McKinneys' New York Social Services Law

Section 383(2)

"2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded."

* * *

Section 400

"When any child shall have been placed by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

Title 18 of the New York State Code of
Rules and Regulations

"450.14[now §450.10] Removal from

foster family care. (a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof."

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section."

QUESTIONS PRESENTED

1. Was there a sufficient case or controversy within the provisions of Article 3 §2 Clause 1 of the United States Constitution to permit the Three Judge Court to determine on the merits that foster children who have lived continuously in a foster home for more than one year are entitled to hearings before removal from the foster homes, where the court appointed counsel for the foster children class argued that such pre-removal hearings were not constitutionally required and that the challenged statutes and regulations were constitutional?

2. Does the due process clause constitutionally require state and municipal officials to afford certain foster children hearings before removing the foster children from their foster homes?

3. Assuming, arguendo, that due process does require a prior hearing, does the procedure promulgated by the City of New York, which procedure provides a hearing for all foster parents who request it, except where the child is being returned to his natural parent, or where there is an emergency and where the child has not lived in the foster parents' house for more than one year, satisfy due process?

4. Are the two classes which have been determined before to be appropriate, all foster parents who have had a foster child live with them continuously for one year and all foster children who have lived continuously with their foster parents for one year, proper?

STATEMENT OF CASE

(1)

This action for declaratory judgment

and injunctive relief was commenced on May 9, 1974.* The action was brought on behalf of two separate classes of plaintiffs. One class consists of all children in New York State who have been in a particular foster home continuously for more than one year (Second Amended Compl., par 5). The other class consists of all foster parents who have foster children in their home continuously for more than one year (id. par 5, 13).**

*Since the commencement of this action Henry Smith has succeeded James Dumpson as Administrator of the Human Resources Administration and Carolyn Parry has succeeded Elizabeth Beine as Director of New York City Bureau of Child Welfare.

** References in parentheses are to the original papers submitted to the Three Judge Court. The factual statement is intentionally brief and is intended to supplement the factual statements submitted by the other appellants.

The defendants are state and local officials who, under the applicable provisions of the Social Services Law and regulations, are charged with administering foster-care services in New York State. The intervenor-defendants are the natural parents who have placed their children in foster care.

The complaint sought a declaration that Sections 383(2) and 400 of the New York Social Services Law and 18 N.Y.C.R.R. 450.14 [now 450.10] violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment (compl., pars. 59-77). Section 383(2) permits an authorized agency, which has placed a foster child in a foster home, to remove such child when in their discretion a change is warranted. Section 400 authorizes the local welfare officer who has placed a child in a foster home

to remove the child. 18 NYCRR 450.14 sets forth a procedure required to be followed by the authorized agency or local welfare officer before a child can be removed from his foster home. The procedure provides for ten days notice to the foster parents. The written notice informs the foster parents of the availability of an administrative conference if requested by them. If a hearing is requested, the child cannot be removed until three days after notice of the decision has been sent to the foster parents. The decision must also advise the parents of their right to request a fair hearing pursuant to Section 400 of the Social Services Law.

The complaint contended that these procedures did not provide the foster parents and foster children with a full hearing before the children were removed and, there-

fore, the procedures were defective (id., par.61).

The complaint requested that a three judge court be convened (Compl., page 23). After the three judge court was convened, the court on its own motion, assigned independent counsel to represent the foster children. The plaintiff foster parents moved for an order continuing the New York Civil Liberties Union as counsel for the foster children, or in the alternative, for the appointment of a guardian ad litem for the children. Both requests were denied, in an opinion, by Judge Carter on December 10, 1974.*

*After the Three Judge Court had rendered its decision on the merits on March 22, 1976, the plaintiff foster parents again moved to substitute new counsel. The motion was denied on June 30, 1976. The plaintiff foster parents have filed a notice of appeal to the Court of Appeals and sought an expeditious hearing. The appeal is scheduled to be heard the week of October 12, 1976.

Prior to the convening of the three judge court, on August 5, 1974, the New York City Defendants promulgated a new procedure, SSC Procedure No. 5, for the removal of foster children from foster homes (procedure attached hereto as Appendix C). The new procedure applies to all removals of foster children except where foster children are being returned to their natural parents, emergency situations or where the foster child has been in the foster home for less than one year. Pursuant to the procedure, if the foster parents object to the removal of the child, they are entitled to request an agency conference or independent review on a form provided them by the New York City Department of Social Services (SSC Procedure No. 5, p. 2, par.6). An independent review is conducted by an independent review officer. At the review

the foster parents can be represented by counsel and present witnesses and other evidence (id., at p.4). A tape recording is made of the proceedings. Within five days, the reviewer is required to render a written decision and advise the parents of their right to a State fair hearing (id.).

During the proceeding before the Three Judge Court, expert testimony was presented relating to the emotional attachments between foster parents and foster children. The testimony also compared the foster home relationship with biological parenthood. The testimony was conflicting (Compare Dr. Marie Friedman, deposition of March 3, 1975, pp. 9-10 and Dr. Albert Solnit, deposition, of April 1, 1975, p.13, with David Fanshel, deposition of April 8, 1976, p. 38, Henry Grunebaum,

deposition of April 10, 1975, p.20).

(2)

In granting the injunction and declaring the challenged statutes and regulations to be unconstitutional as applied, the Three Judge Court (one judge dissenting) noted that it had to determine whether the procedures established by the challenged statutes and regulations deprived the foster parents of "liberty and property interests" without due process of law. 411 F. Supp. p. 1146.

The Court found that the foster parents did not have a property interest citing this Court's decision in Board of Regents v. Roth, 408 U.S. 564 (1972). 411 F. Supp. at p. 1148. It noted that foster parents could not have any expectancy of continuing their foster care relationship with a particular child since each foster parent,

prior to accepting a foster child, is required to sign a form which reserves to the agency the right to "recall the child upon request, realizing that such request will only be made for good reason." 411 F. Supp. at p. 1148.

The Court, citing Goldberg v. Kelly, 397 U.S. 254 (1970), and Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951), apparently found that a foster care relationship is similar to a biological family, and, therefore, that foster children are entitled to be heard before being subject to possible "harmful consequences of a precipitious and perhaps improvident decision to remove a child from his foster family." 411 F. Supp. at p.1150.

The Court then reviewed the new procedures implemented by New York City on July 1, 1974, during the pendency of the

the proceeding. It found those procedures deficient because the pre-removal hearing is available only upon the affirmative request of the parents. Such a restriction "is inconsistent with our holding that it is the child's right to avoid arbitrary dislocation which necessitates a hearing." 411 F. Supp. at p.1152.

The Court also found New York City's regulations to be deficient since they have no applicability when the child is returned to the natural parents. The Court could not find any basis for such a distinction. 411 F. Supp. at p. 1153.

The New York City procedures provided an independent review attended by the foster parents and the agency representative. The Court found that, to insure that all relevant material is presented to the hearing examiner, the child and biological parent

should be heard as well. 411 F. Supp. at p. 1153.

(3)

In dissenting, Judge Pollack reviewed the challenged procedures which included an administrative review before removal and a fair hearing after removal. The fair hearing decision was subject to court review in an Article 78 proceeding in the New York State Courts (dissenting opinion, p.1).

The judge noted that all the judges on the panel agreed that there was no merit to the plaintiff foster parents' argument that the foster parents have a property interest in the retention of the foster child (id. at p.3). The judge further noted that the majority had found a liberty interest entitling foster children to a pre-removal hearing over the objection of the representative of the children, who urged that

the challenged procedures were constitutional (id. at p.4). The position on the children taken by the Court was urged only by the foster parents who have no standing to assert the children's interest (id.).

As to the merits, Judge Pollack found that the Court should not interfere with the delicate system of foster care established by the New York State legislature (id. at p.6). He noted that the pre-removal conference and the procedures leading thereto had not been shown to be defective from the viewpoint of the foster child (id. at p.8). He concluded (pp.8-9):

"The State legislature which spawned the statutory scheme that makes the foster parent-child relationship possible has made the rational decision that until it is 24 months old this relationship can never be sufficiently strong to require pre-termination hearing protection. While not abdicating its constitutional responsibilities or improperly deferring to a state legislature, the Court should not overturn

the legislature's decision absent adequate proof that it is irrational or unfair. In short, it can recognize the State legislature's superior factfinding ability and it can agree with that legislature's decision without avoiding its obligation to determine what does and does not satisfy the Due Process Clause.

The Supreme Court has warned against a return to the days of substantive due process.

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable; that is, unwise or incompatible with some particular economic or social philosophy.... We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.... we refuse to sit as a 'super legislature to weigh the wisdom of legislation,' [citation omitted] and we emphatically refuse to go back to the time when courts used the

Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' [citation omitted].... The ... statute may be wise or unwise. but relief, if any be needed, lies not with us but with the body constituted to pass laws for the State.... Ferguson v. Skrupa, 372 U.S. 726, 729-732 (1963).

This warning applies equally well to the social as to the economic sphere. While (in the first two years of foster parentage) it may conceivably be wiser to hold a pretermination hearing to hear the parties out, it is not, thereby, constitutionally required. The evidence has not shown that, during those first two years, the foster parents and the foster child are not afforded adequate due process. The choice of providing a pretermination hearing after one year of foster parentage rather than the two year period now embodied in SSL §383(3) through the right of intervention, is a choice that seems particularly legislative in character."

THE QUESTIONS ARE SUBSTANTIAL

(1)

We join in the arguments presented by the other appellants. We will present some additional brief comments.

Article III Section 2 Clause 1 of the United States Constitution limits the exercise of judicial power to "cases" and "controversies". The controversy "must" be definite and concrete, touching the legal relations of parties having adverse legal interests. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937). See also; O'Shea v. Littleton, 414 U.S. 488, 493 (1974).

In this case, the decision of the Three Judge Court was not based on the legal relations of the parties having adverse interests. The Court, rejecting the claims of the plaintiff foster parents, held that the rights of the foster children under

due process required that a hearing be held before a child could be removed from a foster home. The existence of such a right was not urged upon the court by any party or his attorney to the proceeding. Indeed, the court appointed attorney for the children argued that the challenged procedures were adequate to protect the rights of foster children.

Apart from the absence of any party or his attorney asserting the position adopted by the Court, the relief actually granted was never requested by any party or his attorney at any time during the proceeding. The New York Civil Liberties Union, the attorneys for the plaintiff foster parents, who originally brought the action on behalf of foster parents and foster children, only sought relief that would permit foster parents who requested a hearing to be given

such a hearing before the removal of the child (See Compl, pars. 29, 30, 31, 33, 59, 70; Plaintiffs' Memorandum of Law in Support of Motion for Declaratory Judgment and Preliminary Injunction, at pp. 26-27). Despite the absence of any party or his attorney requesting such relief, the Court held that every child in a foster home has a right to a hearing before removal even if the foster parents do not request such a hearing.

The determination of the important constitutional issues by the Court in favor of the plaintiff foster children, contrary to the position taken by the children's counsel, and the granting of relief not suggested to the court by any party before it, violated the requirements of Article III, Section 2, Cl. 1.

(2)

With respect to the merits, we submit that the decision of the Court in this case, invoking procedural due process so as to require an evidentiary hearing before a child who has continuously resided in a foster home for more than a year can be removed from the foster home, is incorrect.

We do not deny that there may exist an emotional relationship between a foster child with a foster parent, which upon severance could have some affect on the foster child. We submit, however, that this emotional relationship, somehow becoming constitutionally significant after one year, does not entitle the foster child to a due process hearing.

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character

of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). Some of the factors to be considered include the nature of the right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity and consequences of any action that might be taken and the administrative burden that would be imposed in requiring a hearing.

Applying these factors to various factual situations, this Court has found that certain interests were so fundamental as to require a hearing before such interests could be adversely affected by government action. A prior hearing has been required where the government action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

Similarly, the individual's right to earn a living in his chosen occupation was determined to be a fundamental right, and therefore a license to engage in that occupation could not be revoked without a hearing. Schwartz v. Board of Bar Examiners, 353 U.S. 232 (1957). See also Bell v. Burson, 402 U.S. 535 (1971). It is noteworthy that, where an individual was not barred from his profession but only refused re-appointment to a job, this Court held that due process did not require a hearing before the termination of employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Even where the individual, had worked in the college system for a period in excess of ten years, this Court held that due process required a hearing only if it could be shown that the individual had the contractual equivalent

of job tenure. Perry v. Sindermann, 408 U.S. 593 (1972). Cf. Bishop v. Wood, __ U.S. __, 48 L. Ed. 2d 684 (1976).

In the instant case, the interest, however, defined, of the foster child in the foster care relationship with a specific foster family is adequately protected by the challenged administrative procedures and existing court remedies. Cf. Arnett v. Kennedy, 416 U.S. 134 (1974). The administrative procedure requires the public welfare department or authorized agency to give the foster parents ten days notice of a removal of a foster child from their home. Following the notice, the foster parent may request an administrative conference. The child cannot be removed until three days after the conference. A decision to remove can be challenged by

the parent in a fair hearing. The foster parent can seek review of a determination in an Article 78 proceeding in the New York Supreme Court pursuant to CPLR 7800 et seq.

In addition to these administrative procedures, the New York State Legislature, has authorized periodic review by the Family Court of all children in foster care for a continuous period of 18 months.* New York Social Services Law, Section 392. The authorized agency charged with the care of a foster child is required to file a petition seeking such review. In addition, the foster parents are permitted to file a petition for review and participate in the Family Court proceeding. During the proceeding the foster care parents are entitled to give their opinions to aid the

*The original law provided for a twenty four month period which was reduced to eighteen months in 1975. Chap. 708.

Family Court in determining what future placement would be in the best interests of the child. Section 383.

The Three Judge Court, citing Goldberg v. Kelly, 397 U.S. 254 (1970), found, apparently on the theory that the removal implicates the child's liberty interest, that the children's right to avoid arbitrary dislocations requires a pre-removal hearing. In Goldberg this Court noted that the crucial factor was that "termination of aid pending resolution of the controversy over eligibility may deprive an eligible recipient by which to live while he waits" (397 U.S. 564). Two other factors were present in Goldberg: welfare was mandated by federal law and an evidentiary hearing would be appropriate because the issue of eligibility would be determined based on eyewitness testimony and documentary evidence.

In this case, unlike in Goldberg, the children will continue to be provided with foster care services during the pendency of the administrative procedures and subsequent court proceedings. Unlike welfare, foster care service is not a mandated federal program but established by state laws, which laws also provide the conditions under which foster parents accept foster children. In addition, any evidentiary hearing would primarily consist of opinion testimony as to what is best for the child. The challenged statutory procedures, instead of requiring a full hearing, properly rely on the expertise of the social services workers, who, because of their knowledge and experience, can determine whether it is in the best interests of the child to be removed from a foster home. It can be presumed that the social service workers act

in the child's best interest. These workers have no adverse interest financial or otherwise, which would be furthered by removing a child from a particular foster home.

In Matthews v. Eldridge, ___ U.S. ___ 96 S. Ct. 893 (1976), this Court, in holding that a hearing was not required before terminating disability benefits, distinguished Goldberg, noting that the determination of eligibility for disability benefits is best determined by medical personnel and tests, rather than an evidentiary hearing.

The Court in the instant case stated that it would not consider plaintiffs' assertion that a foster home is entitled to the same constitutional protection as the traditional biological family. 411 F. supp. at p. 1144. But in determining that the foster children are entitled

to pre-removal hearings, the Court has in fact increased the rights of foster parents and decreased the rights of the biological parents. Such a result conflicts with this Court's recognition of the unique rights attaching to the biological family. Compare Stanley v. Illinois, 405 U.S. 645 (1972) with Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). See also, Ramos v. Montgomery, 315 F. Supp. 1179 (S.D., Col., 1970), affd. 400 U.S. 1003 (1971).

This diminution of the biological family's rights is contrary to the intent of the foster care program to return the children to the biological parents as soon as possible. See Matter of Jewish Child Care Assn. (Sanders) 5 NY 2d 222, 225 (1959).

This Court has recognized the principle that a court should not substitute its social and economic beliefs for the judgment of legislative powers under the authority of the due process clause. Ferguson v. Skrupa, 372 U.S. 726, 729 (1963). Consistent with Ferguson, this Court recently in Paul v. Davis, ___ U.S. ___, 96 S. Ct. 1155 (1976), in dismissing a §1983 action based on defamation, recognized that a plaintiff has a heavy burden to sustain in order to implicate a liberty interest sufficient to invoke procedural due process. See also, Meachum v. Fano, ___ U.S. ___, 96 S. Ct. 2532 (1976). This principle should be followed in this case. The foster care program established by New York, as part of a comprehensive program, involving both administrative agencies

and the judicial system, should not be altered by a federal court under the authority of the due process clause in the absence of any showing of grave abuses under the present procedures.

(3)

Assuming, arguendo, that due process does require a hearing before a foster child can be removed from a particular home, it is submitted that the procedures promulgated by the City of New York, on August 5, 1974, during the pendency of the court proceeding, satisfied the requirements of due process. The procedure is set forth as Appendix C annexed to the Jurisdictional Statement. The City's procedure provides for a hearing at the request of the foster parents. At the hearing, the parents are permitted to have counsel, present evidence and to cross-examine opposing witnesses.

The District Court objected to the City's procedures because the hearing would only be provided at the request of the foster parents. No hearing would be provided where the child was returned to his natural parents and the natural parents would not be a party to the pre-removal hearings.

The City's procedure properly requires the foster parents to request a hearing. The purpose of the hearing would be to review the reasons for the agency's determination to remove the child from the foster care home. If the foster parents do not request a hearing and are therefore in agreement with the transfer there would be no purpose to a hearing.

As we discussed above, the City's procedure satisfies the claims of the

original counsel for all the plaintiffs. As Judge Pollack noted, in his dissent, the District Court's mandate that a hearing be provided even when not requested by foster parents has come as a surprise to all the defendants (dissenting opinion, pp. 4-5).

The District Court's provision for a hearing, even when no foster parent requests it, is apparently based on an assumption, without any proof in the record, that the professionals charged with the responsibility of operating the foster care program will act adversely to the child. Such an unsupported conclusion does not provide a basis to impose such a procedure on a state or a municipality.

The requirement of a hearing even where there is no request imposes a huge administrative burden on the City of New

York. Since the implementation of the new procedures in 1974, there have been only 26 hearings, which included 16 hearings in all of 1975. The small number of hearings requested indicates that the social services agencies are rendering decisions not adverse to the child.

The District Court order will require hearings for all 2800 transfers a year. The defendants, in a time of great fiscal crisis, will be required to hire more than 100 employees to act as hearing officers and child representatives. In addition to the expense and administrative burden, the holding of thousands of hearings will result in inevitable delays in moving children.

The City's procedures properly do not require a hearing where the child is to be returned to the natural parent. In New York State, in the absence of abandonment, a

statutory surrender or a judicial finding of unfitness, the child must be returned to his natural mother. See Spence Chapin Adoption Service v. Polk, 29 NY 2d 196 (1971). See also, Boone v. Wyman, 295 F. Supp. 1143, 1150 (S.D.N.Y., 1969), affd. 412 F. Supp. 857 (2d Cir., 1969), cert. den. 396 U.S. 1024 (1970). A due process hearing would place the natural parents in an unfair position since it would compel them, in an administrative proceeding, to justify their rights to their own children. As we noted above, this would be contrary to the purpose of foster care to return the children to the natural parents as soon as the parents are ready to care for them.

Since the implementation of the new procedures, only seven foster parents have

sought review of decisions to return foster children to their natural parents, despite the fact that there have been almost two thousand such decisions since 1974. In light of this history, it is unnecessary to require such hearings, at which the natural parents participate, which would inevitably result in emotional confrontations between foster parents and natural parents to the detriment of the foster child.

Where a hearing is held to determine whether a child should be transferred from one foster home to another, the City's procedure properly refuses to allow the natural parent to participate. The natural parents, who at this proceeding have no desire to have the child returned to them, would not add anything of substance to the proceeding and their participation would

only result in delay and confusion on the narrow issue before the hearing officer.

(4)

With respect to the issue relating to the class action, the District Court certified the class to include all foster children who have lived continuously for more than one year in the same foster home. The acceptance of the one year period as requested by the plaintiffs highlights the unusual nature of this case. There is nothing in the record to show that at one year the relationship becomes so substantial as to warrant the invocation of the due process clause. It is submitted that the relationship of a foster child who has been in a home for one year, with his foster parents is of a different character than the relationship of a foster child, who has been living continuously in a foster

home for five years.

Judge Pollack, dissenting in the instant case, stated in words peculiarly applicable to all the issues raised on this appeal (p. 7):

"In holding that a child's interest requires that foster parents have a formal voice in any decision to remove the child after a year of foster parentage or whenever the child is placed with them for 'long term care' the Court first undertakes to express a social policy preference for a one year rather than the present statutory two year period, and then hedges by promulgating a vague standard (as yet undefined in this system) apparently meant to test foster parent - child relationships from their incipiency. There is no support for such a use of the Fourteenth Amendment.

CONCLUSION

FOR THE FOREGOING REASONS, THE QUESTIONS PRESENTED ON THIS APPEAL ARE SUBSTANTIAL AND MERIT PLENARY CONSIDERATION OF THE COURT. PROBABLE JURISDICTION SHOULD BE NOTED AND THE CASE SET FOR ORAL ARGUMENT.

August 6, 1976.

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
of the City of New York,
Attorney for New York
City Appellants.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
ELLIOT P. HOFFMAN,
of Counsel.

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
May 24, 1976

Marttie L. Thompson, Esq.
Community Action for Legal
Services, Inc.
335 Broadway
New York, N.Y. 10013

Re: Bernard Shapiro, Exec.
Dir. of New York State
Bd. of Social Welfare,
et al.; Danielle and
Eric Gandy, et al.;
James Dumpson, Admr. of
New York City Human Re-
sources Administration,
et al.; and Naomi
Rodriguez, et al. v.
Organization of Foster
Families for Equality
and Reform, et al. Nos.
A-985, A-986, A-987 and
and A-988

Dear Sir:

The Court today entered the following
order in the above-entitled cases

The applications for stay of the
judgment and order of the United
States District Court for the
Southern District of New York
(74 Civ. 2010), presented to
Mr. Justice Marshall and by him
referred to the Court, is granted

Al

pending the timely docketing of
an appeal, or appeals, with this
Court.

Very truly yours,

Michael Rodak, Jr., Clerk
By Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

cc: Hon. Louis J. Lefkowitz
Atty. Gen. of New York
Two World Trade Center
NYC 10047

Ms. Helen L. Bittenwieser
575 Madison Ave.
NYC 10022

W. Bernard Richland, Esq.
Corporation Counsel NYC
Rm. 1637, Municipal Bldg.
NYC 10007

Marcia Robinson Lowry
Children's Rights Project -
N.Y. Civ. Lib. Union
84 Fifth Ave.
NYC 10011

John F. O'Shaughnessy, Esq.
Nassau County Atty.
1 West St.
Mineola, N.Y. 11501

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ORGANIZATION OF FOSTER
FAMILIES FOR EQUALITY AND
REFORM; MADELINE SMITH,
on her own behalf and as
next friend of DANIELLE
and ERIC GANDY; and
RALPH and CHRISTIANE
GOLDBERG, on their own
behalf and as next friend
of RAFAEL SERRANO, and
GEORGE and DOROTHY LHOTAN,
on their own behalf and as
next friend of CHERYL,
PATRICIA, CYNTHIA and
CATHLEEN WALLACE, on
behalf of themselves
and all others similarly
situated,

Plaintiffs,

-v-

JAMES DUMPSON, individually
and as Administrator of the
NEW YORK CITY HUMAN RESOURCE
ADMINISTRATION; ELIZABETH
BEINE, individually and as
Director of the NEW YORK
CITY BUREAU OF CHILD WEL-
FARE, and as Acting Assistant
Administrator of NEW YORK
CITY SPECIAL SERVICES FOR
CHILDREN; ADOLIN DALL,
individually and as

NOTICE OF
APPEAL TO
THE SUPREME
COURT OF
THE UNITED
STATES

74 CIV.2010
(R.L.C.)

-----x
Director of the DIVISION OF INTER-
AGENCY RELATIONSHIPS of the BUREAU
OF CHILD WELFARE; and JAMES P.
O'NEILL, individually and as
Executive Director of CATHOLIC
GUARDIAN SOCIETY OF NEW YORK;
BERNARD SHAPIRO, individually and as
Executive Director of the New York
State Board of Social Welfare; ABE
LAVINE, individually and as Commissioner
of the New York State Department of
Social Services, and JOSEPH D'ELIA,
individually and as Commissioner of the
Nassau County Department of Social
Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY
ROBINS; DOROTHY NELSON SHABAZZ; and
LILLIAN COLLAZO, on behalf of them-
selves and all others similarly
situated,

Intervenors-Defendants

-----x
S I R S :

NOTICE is hereby given that the de-
fendants James Dumpson, Elizabeth Beine,
and Adolin Dall hereby appeal to the
Supreme Court of the United States from

the order and judgment entered herein in the Office of the Clerk of the United States District for the Southern District of New York on april 14, 1976 wherein it is adjudged that New York Social Services Law §§ 383 (2) and 400 and N.Y.C.R.R. §450.14 as presently applied are unconstitutional.

This appeal is taken pursuant to
28 U.S.C. §1253.

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York
Attorney for Defendants,
Dumpson, Beine and Dall
Office and P.O. Address:
Municipal Building
New York, N.Y. 10007

By CARL SANDERS

TO:

MARCIA ROBINSON LOWRY, ESQ.
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
Attorney for Plaintiffs
Organization of Foster Families
for Equality and Reform
Madeline Smith
Ralph and Christiane Goldberg,
on behalf of themselves and all
others similarly situated

HELEN L. BUTTENWIESER, ESQ.
575 Madison Avenue
New York, New York 10022
Attorney for Danielle
and Eric Gandy
Rafael Serrano, on behalf of
themselves and all others
similarly situated

MARTTIE LOUIS THOMPSON, ESQ.
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Mary Robins
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Attorney General
Two World Trade Center
New York, New York 10049
Attorney for Defendants
Shapiro and Lavine

PROCEDURE FOR REMOVAL OF CHILDREN
FROM FOSTER FAMILY CARE

August 5, 1974

TO: Executive Directors, Voluntary
Child Caring Agencies

FROM: Carol J. Parry, Assistant Adminis-
trator Special Services for
Children

SUBJECT: Removal of Children From Foster
Family Care
SSC Procedure No. 5 - August 5,
1974

Enclosed are copies of the above named pro-
cedure which required the use of a new Exp.
Form FC-6.

You will note that the model Exp. Form
FC-6 bears the letterhead of Special
Services for Children. Each agency should
use the identical text on its own letter-
head in accordance with the procedure.

Enc. (2)

THE CITY OF NEW YORK - HUMAN RESOURCES
ADMINISTRATION
DEPARTMENT OF SOCIAL SERVICES - SPECIAL
SERVICES FOR CHILDREN

SUBJECT: REMOVAL OF CHILDREN SSC PRO-
 FROM FOSTER FAMILY CEDURE NO.
 CARE 5

TO: Executive Directors, August 5,
 Voluntary Child Caring 1974
 Agencies
 Staff, Special Services
 for Children

I. INTRODUCTION

In recognition that there are considerations of due process which should be protected in removal of children from foster family homes, and at the same time bearing in mind that the Commissioner of Social Services has the duty and responsibility to provide care and services for children who are public charges which are in their best interests, the following procedural changes within the framework of Social

Services Law Section 400 and SDSS Regulation 450.14 are to be instituted prior to the removal of a child from a foster home. These changes do not apply when a child is being discharged to his own family home, in which case the procedural instructions outlined in Appendix A, attached, shall be followed. They also do not apply when the health and safety of a child are endangered. In such a case the child should be removed immediately. The instructions below, which provide for an Agency Conference and an SSC Independent Review, do apply to children in both Voluntary Agency or SSC Directly Operated Programs who have been placed in boarding homes under a plan for long-term care, or who have remained in shelter boarding homes for a period of one year or more, and are relevant to situations where a child is being transferred

to another boarding home, to another child care facility, or to an adoptive home.

II. DETAILED INSTRUCTIONS

A. Notice of Intention to Remove a Child From a Foster Home

1. Sound casework practice should include home visits with foster parents whenever removal of a foster child from their home is being considered. In such visits the reasons for the plan should be interpreted to the foster parents so that they be afforded an opportunity to discuss the situation and cooperate in carrying out the plan. Such visits and discussions should take place as early as possible so that both the foster parents and children may be well prepared for any change.
2. If the ultimate casework decision is

to proceed toward removal of the child from the foster home in situations where the imminent health and/or safety of the child is not involved, or where removal is not for the purpose of returning the child to his own family home, the Voluntary Agency caseworker shall prepare a Notice of Intention to Remove a Child from a Foster Home, Form Exp. FC-6, quintuplicate; the SSC caseworker shall prepare the Form Exp. FC-6, in quadruplicate.

3. If the foster parents are being formally advised during a home visit of the decision to remove the child, the caseworker should have available the above prepared Form Exp. FC-6 with the reasons for the decision stated thereon. After discussion and inter-

pretation, which include the alternatives of an Agency Conference and/or Independent Review to which he is entitled, the worker shall provide the foster parents with a dated original and one copy of the Form.

4. The foster parents should be informed of the need to express their reaction to the plan for removal of the child by checking the appropriate boxes on the Form Exp. FC-6, which can then be returned to the caseworker at the time of the visit. Upon return to the office, an SSC caseworker will date the third and fourth copies of Form Exp. FC-6, filing the third copy in the case record and, if the foster parents are not in agreement with the plan, forward the fourth copy to the SSC Independent Review Team Supervisor.

A Voluntary Agency caseworker will similarly date his third, fourth, and fifth copies and forward the third copy to the SSC IARP Team, and if the foster parents do not accept the plan, forward the fourth copy to the SSC Independent Review Team Supervisor, and file the fifth copy in the agency case record.

5. If the foster parents have no objection to the removal of the child, the caseworker shall request them to execute the waiver on Form Exp. FC-6 and discuss with them arrangements for removal of the child. The Voluntary Agency should forward one copy of the Form to the IARP Team, a second copy to the SSC Independent Review Supervisor.
6. If the foster parents do not wish to

execute the waiver and/or oppose the removal of the child from their home, the caseworker shall explain the processes of the Agency Conference and Independent Review options available to them, as well as their option to subsequently execute the waiver at any stage of the Agency Conference and/or Independent Review, and impress upon them the urgency of making immediate arrangements for the scheduling of such a Conference and/or Independent Review. An Agency Conference, if desired, must be held within 5 days of the date of the Notice on Form Exp. FC-6. The foster parents should therefore be helped to state their request or to complete the appropriate boxes on the Form at the time of the caseworker's visit and delivery of the

Form to them. If they are unwilling or unable to do this at that time, they should be advised to telephone the caseworker within 48 hours of the date of the Notice if they wish an Agency Conference, in view of the narrow time frame involved. An Independent Review must be requested within 10 days of the date of Notice on Form Exp. FC-6 with the Review required to be held within 10 days from the date of their request for one. The foster parents should be advised that the time frames above will be strictly adhered to.

7. If the foster parents indicate that they wish to request an Agency Conference and/or Independent Review at the time of the caseworker's visit, their complete copy of the Notice on

Form Exp. FC-6 should be accepted from them. If they are requesting an Independent Review at that time, or may request it later, they must be advised to make the required telephone request to the SSC Independent Review Supervisor within 10 days of the date of the Notice on Form Exp. FC-6.

8. If for any sound reason the notification of the decision for removal is not delivered during the course of a home visit, the prepared original and the copy of Form Exp. FC-6 shall be mailed to the foster parents, dated as of the date of mailing.
9. At any stage of the foregoing procedure, the foster parents may give an informed written waiver of their right to an Agency Conference and/or Independent Review and return the child

to the Voluntary Agency or SSC Direct Care Program.

B. The Agency Conference

1. When indicated during the home visit, or following the receipt of a phone call from the foster parents requesting an Agency Conference, the SSC or Voluntary Agency caseworker or supervisor shall advise the foster parents of the time and place of the Conference, that the purpose of the Conference is to review the basis for the decision with the foster parents only, and that no other representative will be allowed to attend. The date of the Conference shall be set within five days of the date of the notice on Form Exp. FC-6 to the foster parents.
2. The conduct of the Conference shall be

held in accordance with casework principles and concepts, (as distinct from the legal concept of "due process" which applies in the Independent Review), with the foster parents given full opportunity to express their objections to the removal of the child and the reasons therefore. A complete summary of the Conference shall be entered in the case record with a Voluntary Agency preparing a copy for forwarding to the SSC IARP Team, and another copy for presentation at the time of the hearing should an Independent Review also be requested.

C. The Independent Review

1. Upon receipt of a phone call from the foster parents by the Independent Review Supervisor requesting an Independent Review, the Supervisor shall

determine if a Conference at the Agency had been requested and if the foster parents intend to be represented at the Review. An Independent Review must be requested within 10 days of the Notice on Form Exp. FC-6 and be scheduled within 10 days of the date of the request by the foster parents. The Independent Review Supervisor shall notify the SSC Direct Care Unit, or the Voluntary Agency and the appropriate IARP Team of the date and time of the scheduled hearing and request they be present and be prepared to present their position and any supporting evidence. A copy of the dated notice on Form Exp. FC-6 returned by the foster parents shall be delivered to the Independent Review Supervisor within 48 hours. If the

foster parents indicate their intention to be represented by Counsel, the Independent Review Supervisor shall advise the HRA Office of Legal Affairs in writing of the time and place of the Review so that Counsel may participate.

If two agencies are involved, one the agency carrying family case planning responsibility, the other the agency providing the foster care to the child, both must be included and participate in the planning and decision.

2. The Independent Review shall be conducted by the Independent Review Officer of SSC in accordance with the concepts of due process, in that:
 - a. The Review shall be heard before an SSC official on a supervisory level who has had no previous

involvement with the decision to remove the child. (The only information appropriate for the Reviewer to possess prior to the conduct of the Review is a copy of Form Exp. FC-6, Notice of Intention to Remove a Child from a Foster Home, given to the foster parents, including the basis for the foster parents' objections thereon, and the date of the scheduled hearing);

- b. The foster parents may be represented by Counsel and have the right to present witnesses and other evidence on their behalf;
- c. The SSC Direct Care Unit or the Voluntary Agency and the appropriate IARP Team, as the case may be, shall be present, have

the right to present testimony and evidence in support of their decision to remove the child, and be represented by Counsel;

- d. Witnesses may be cross-examined, and all evidence presented is subject to review by all parties;
- e. There shall be a tape recording or stenographic record of the Review and the foster parents shall be entitled to a copy or transcript thereof, upon request and payment of the cost for duplication;
- f. The Reviewer shall render a written decision within five work days after the Review setting forth the decision and the reasons therefore, and shall advise the foster parents of

their right to a State Fair
Hearing;

g. The decision in writing shall
be mailed to the foster parents
and to their Counsel if they are
so represented.

3. All persons other than the parties
(foster parents, SSC Direct Care Pro-
gram worker and supervisor, Voluntary
Agency worker and supervisor, and IARP
Team representative) and their Counsels
shall be excluded from the Review Room
unless giving testimony. All witnesses
shall be sworn, except that parties
may stipulate that the testimony is
deemed as being given under oath.

4. The SSC Direct Care Program repre-
sentative, Voluntary Agency repre-
sentative, or SSC IARP representative
shall present their case in support

of the removal of the child from the foster home first. The foster parents shall thereafter present their case in support of their objection to this decision. All witnesses shall be subject to cross-examination. If any portion of, or report contained in, a case record is to be used in support of the case for removal of the child, the Reviewer is required to allow the Counsel for the foster parents to also review such report or portion of the case record. Copies of this documentation or evidence should be duplicated for presentation to the Independent Review Supervisor.

5. Within five days after the completion of the Independent Review, the Reviewer shall render a written decision based upon the evidence and testimony

received at the Review, whether to affirm the decision to remove the child, or to disapprove such removal. The decision shall set forth the facts relied upon in reaching such decision, and if the decision is to affirm the removal of the child shall advise the foster parents of their right to request a State Fair Hearing pursuant to Section 400 of the Social Services Law. Copies of the Independent Review decision shall be forwarded to the Directors of the Bureau of Child Welfare and the SSC IARP Program. The decision of the SSC Independent Review Supervisor is binding on the Child Caring Agency.

6. The Independent Reviewer shall also mail copies of the written decision to the foster parents and their

Counsel if represented, as well as to the SSC Direct Care Program and/or Voluntary Agency and IARP Team. In addition, the Reviewer may, if so desired, elect to notify the parties by telephone.

7. If the Independent Reviewer affirms the decision to remove the child from the foster home, the child shall not be removed for at least three days after written notice of the written decision is mailed to the foster parents, or prior to a proposal effective date of removal, whichever occurs later.

TO:

Date:

Notice of Intention
To Remove A Child
From A Foster Home.

Dear

The care and attention you have given to foster child(ren) in your home is greatly appreciated. This has been a service not only to the child(ren), but to the entire community. To continue to plan for

we now consider it in (his) (her) (their) best interest(s) to leave your home on or about (date)_____.

The plan for the child(ren) is to:

☐ place (him) (her) (them) in another foster home or other appropriate facility because_____

☐ place (him) (her) (them) in an adoptive home because_____

If you have no objection to the removal of the child(ren) from your home, please

indicate this by signing the waiver on page two and return it to your caseworker immediately.

However, if you have any objection to the removal of the child(ren) from your home, you may request an Agency Conference with your caseworker and supervisor, which shall be held within five (5) days from the date of this notice, at which time you may present your reasons for objecting to the child(ren)'s replacement. Please telephone immediately if you desire such a conference. Indicate your objections by checking the appropriate box on the reverse page, and return it to your caseworker.

You may also request an Independent Review within ten (10) days of the date of this notice, in addition to or instead of the Agency Conference. This Independent Review will be held at the Department of Social Services, Special Services for Children office within ten (10) days from the date of your request, at which time you may be represented by an attorney or other representative and present witnesses and other information you consider important. You also will be able to question the Agency's witnesses. Please call _____, SSC Independent Review Team Supervisor, at _____ immediately, if you desire such a review and state whether you expect to be represented. You should also indicate your objection below and check the appropriate box on this letter and return it to your caseworker.

If we do not hear from you within ten (10) days, we will assume that you have accepted the plan and proceed with the child(ren)'s replacement.

Very truly yours,

Caseworker

- ☐ I have no objections to the removal of the foster child(ren) from my home and agree to return the child(ren) to the Agency.
- ☐ I object to the removal of the child(ren) from my house because

- ☐ I desire a conference with my caseworker and supervisor.
- ☐ I desire both a conference and independent review.
- ☐ I desire an independent review instead of a conference.
- ☐ I expect to have a representative present at the review.

Dated: _____ Foster Parent(s) _____

PLEASE NOTE: IF YOU OBJECT TO REMOVAL OF THE CHILD(REN) FROM YOUR HOME,

YOU ARE ENTITLED TO A STATE
FAIR HEARING, IN ADDITION
TO THE AGENCY CONFERENCE AND
INDEPENDENT REVIEW. HOWEVER,
THE CHILD(REN) MAY BE RE-
MOVED FROM YOUR HOME, FOLLOW-
ING THE INDEPENDENT REVIEW,
IF THAT IS THE INDEPENDENT
SUPERVISOR'S DECISION.

Exp. Form FC-6
Aug., 1974

8/5/74

Appendix A - Procedure For Implementation
of SDSS Regulation 450.14 for
Ten-Day Notice Prior to Re-
moval of Child From His
Foster Home

Note: The procedure described below, with model form letter on the reverse side, is applicable only when a child is being discharged to his own parents or legal guardian. In all other cases of removal of a child from his foster home, SSC Procedure No. 5, August 5, 1974 applies.

At least ten days prior to the removal of a child from his foster homes, an agency shall notify the foster parents in writing of the plan to remove the child and the reasons therefore, giving the date of removal, advising the foster parents of their right to a conference with a social services official, should they so desire, and their right to have a representative at the conference.

Foster parents who do not object to the

removal of a child from their home may waive in writing their right to the ten-day notice.

If a conference is requested, voluntary agencies should contact the Director of the Inter-Agency Relationships Program, or, if applicable, the Director of the BCW Office having planning responsibility, to arrange the conference. When the conference is scheduled, SSC will request the agency to supply necessary background information in writing. Because of the tight time frame, immediate cooperation and communication between your agency and SSC is necessary. Kindly inform SSC if your foster parent(s) plans to bring a representative to the conference.

The social services official shall schedule the conference within ten days of receipt of such request and render a decision in

writing within five days to the foster parents, their representative, if any, and the authorized child-caring agency. The written decision shall include a statement that the foster parents have a right to appeal to the New York State Department of Social Services and request a fair hearing in accordance with SSC Section 400.

In the event a foster parent requests a conference, the child shall not be removed from the foster home until at least three days after the notice of decision is sent. This procedure replaces SSC memorandum of September 13, 1973 on the above subject.

76-180

76-183

Supreme Court, U. S.
FILED

AUG 9 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-5193**

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,
Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,
Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,
Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTIANE E. GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,
Appellees.

**APPELLANTS' JOINT APPENDIX TO
JURISDICTIONAL STATEMENTS**

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellants Shapiro and Lavine

HELEN L. BUTTENWIESER
*Attorney for Appellants Danielle and Eric Gandy,
Rafael Serrano and Cheryl, Patricia, Cynthia and
Cathleen Wallace*

MARTTIE L. THOMPSON
Community Action for Legal Services, Inc.
*Attorney for Appellants Rodriguez, Diaz, Robins,
Shabazz and Collazo*

W. BERNARD RICHLAND
Corporation Counsel of the City of New York
Attorney for Appellants Dumpson, Biene and Dall

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Appendix "A", Opinion.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

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APPEARANCES:

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By: JAMES GALLAGHER, Esq.

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LUMBARD, Circuit Judge:

The Organization of Foster Families for Equality and Reform (OFFER) and three individual foster families bring this class action for injunctive and declaratory relief seeking the invalidation of New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14. Plaintiffs allege in their complaint that the above provisions violate both the Equal Protection and Due Process Clauses of the Fourteenth Amendment in that they authorize the state to remove foster children from their foster homes without affording a prior hearing to either foster child or foster parents.¹

Plaintiff foster parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen Buttenwieser as independent counsel for the foster children, advising the parties of his action by letter dated October 29, 1974. In that capacity, she has consistently argued that the foster parents

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have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child."² The defendants—government officials at the state and local level and the Executive Director of the Catholic Guardian Society—are responsible for administering the foster care system within their respective jurisdictions. In addition, five biological mothers of children currently in foster care were granted leave to intervene in these proceedings on behalf of themselves and all others similarly situated.^{2a}

The present statutory scheme, applicable throughout most of the state,³ provides that the local public welfare department or an authorized private agency acting on its behalf⁴ may, in its discretion and on 10 days notice, order the removal of any foster child from the foster home in which he or she has been placed. Social Services Law §§ 383(2) and 400. After having been informed of the impending removal in a printed notice which contains no space for any detailed elucidation of the reasons for that removal, the foster parents may request a conference with a "public official" of the local social services department at which they have an opportunity to express their dissatisfaction with the agency's decision but no formal manner is provided whereby they may contest it. N.Y.C.R.R. § 450.14.

Although the foster parents may be accompanied to the conference by "a representative," they may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit "reasons why the child should not be removed." The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R.

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§ 450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision. Post-removal, the foster parents are entitled to a "fair hearing," Social Services Law § 400(2), and then, if still "aggrieved" by the agency action, they may obtain judicial review.

Plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is the right to familial privacy. E.g. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Cognizant that each of the Supreme Court decisions in this area dealt with a more traditional, biological family, plaintiffs rely on several recent studies which functionally define the family as a psychological rather than a biological unit. Goldstein, Freud and Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD*. Plaintiffs insist that after one year of foster care, emotional attachments have formed which the state should not be at liberty arbitrarily to upset. Plaintiffs further assert that the statistical evidence as to the length of the average child's stay in foster care creates an "informal tenure" system raising legitimate expectations that their role as foster parents will not be abruptly terminated.⁵ *Perry v. Sinderman*, 408 U.S. 593 (1972). To illustrate the arbitrary manner in which they claim the outlined statutory provisions can operate, plaintiffs offer the example of their own personal involvement with the foster care system.

Madeline Smith is a 53 year old widow who lives in East Elmhurst, New York. She became an approved foster parent⁶ under the supervision of the Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children. At the time, Eric was four and Danielle two. Plain-

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tiffs claim, and defendants do not dispute, that Danielle has never seen her natural mother and Eric no longer remembers her. Both children, who are legally free for adoption consider Mrs. Smith to be their mother.

Nevertheless, on March 29, 1974, Mrs. Smith was notified by letter from the Catholic Guardian Society that Eric and Danielle were to be removed from her care because "it is now in their best interests to leave your home." The agency's concern, not shared by Mrs. Smith, was that her arthritis would interfere with her undeniably well-meaning efforts to supervise the increasingly active behavior of Eric and Danielle. Although Mrs. Smith signed a waiver of her right to a pre-removal conference, she made it abundantly plain that she had no intention of surrendering the children. When told that they would be forcibly taken from her, she obtained a lawyer and began the instant litigation. To date, the children remain in Mrs. Smith's home—originally the result of a temporary restraining order, later the product of a voluntary stipulation among the parties.

Plaintiffs Mr. and Mrs. Lhotan are similarly authorized foster parents; they, however, are under the supervision of the Nassau County Department of Social Services Children's Bureau. On September 4, 1970, Cheryl and Patricia Wallace were placed in the Lhotan home; two years later they were joined by their younger sisters, Cynthia and Cathleen. By all accounts, most notably that of the children, the reunion was a happy one for all concerned. Indeed, when Mrs. Lhotan was told on June 26, 1974 that the children were to be removed from her home ten days hence, the only reason given was that the four girls were growing too attached to their foster family. Mrs. Lhotan was informed that Cheryl and Patricia were to be returned to their biological mother while Cynthia and Cathleen were to be transferred to another foster home.

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However, on July 8, 1974, in response to a request by the Lhotans, Judge Carter issued a temporary restraining order barring the removal of the children which had been scheduled for the next day. That order remained in effect until March 3, 1975, when it was dissolved by this court. Meanwhile, Mrs. Wallace, the biological mother, had begun habeas corpus proceedings in the state court to secure the return of her children. On February 23, 1976, the Appellate Division for the Second Department upheld a lower court ruling mandating immediate implementation of the plan devised by the Nassau County Department of Social Services Children's Bureau. The time for appeal of that decision has not yet passed.

Mr. and Mrs. Ralph Goldberg, the final set of plaintiff foster parents, face a less imminent threat. They have, since July 1969, taken care of Rafael Serrano, then six years old. Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop, they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt. While the Goldbergs have yet to be officially notified of any such plan, they join in this action to insure that they will be entitled to a pre-removal hearing if and when such a decision is made.

Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed. Both defendants and intervenors insist, however, that the question now before us is and must be more narrowly focused. We agree. As a statutorily ordained court

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we must limit our inquiry to a determination of whether plaintiffs have established a deprivation of life, liberty or property sufficient to invoke the protection of the Due Process Clause.

We find no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State, justify their expectation that their role as foster parents will not be abruptly and summarily terminated. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). The most obvious and formidable obstacle to plaintiffs' contention is the agreement that each of them signed upon assuming responsibility for their respective foster children. The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves to the agency the right to recall the child "upon request, realizing that such request will only be made for good reason." While such a provision is not dispositive, *Perry v. Sinderman*, 408 U.S. 593 (1972), the discretionary authority which it vests in the agency is on its face incompatible with plaintiffs' claim of legal entitlement. We are unpersuaded by plaintiffs' efforts to equate an open-ended relationship with one of indefinite duration. Nor does evidence showing that the average child placed in foster care remains within the system for approximately 4½ years' support the plaintiffs' position. Cf. *Perry v. Sinderman*, *supra*.

We find considerably more difficult plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family.* Plaintiffs base their contention upon several recent studies which conclude that the "family" can best be conceived as a psychological entity, uniquely characterized by the emotional interdependence of each of its members. E.g. Goldstein, Freud and Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD*. Plaintiffs argue that

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it is this interdependence, born out of daily and intimate contact, which best explains the family's pre-eminent constitutional position. Plaintiff foster parents further insist that their relationship with their foster children fully satisfies this functional definition, although custody of the child is vested in the authorized agency. Social Services Law § 383 (2). They point to decisions such as *Stanley v. Illinois*, 405 U.S. 645 (1972), which, they claim, indicate the Supreme Court's willingness to look behind legal formalities when inquiring into the existence of a fruitful family life.⁹

While the intervenors and defendants rely on precisely the same Supreme Court opinions, they emphasize that the holding of each was limited by its facts to biological families. Intervenors, in particular, strongly protest any implication that the contractual relationship between foster parent and foster child is, or ever can be, the equivalent of the relationship between a mother and the child to whom she has given birth.¹⁰ Intervenors have introduced affidavits from eminent experts in social work and psychology which attack the validity of the concept of the "psychological family."¹¹ The intervenors also argue that this court would be ill-advised to create a precedent which might later be applied to other foster families less concerned and well-intentioned than those now before us.

We agree with the parties that this debate as to the definition of the family and its role in society is an interesting and important one. We need not and should not, however, reach out to decide such novel questions when narrower grounds exist to support our decision. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

We believe that the pre-removal procedures presently employed by the state are constitutionally defective. We

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hold that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child.^{11a} While our decision today is perforce limited to the class as defined in Judge Carter's accompanying certification order, namely all children in foster care for one year or longer, we note that similar interests suggest a similar result whenever the child is placed in a foster home for long term care.¹²

The time has long since passed when children were considered mere chattels of the adults with whom they lived. The foster care system itself, initiated in New York in the latter part of the nineteenth century, represented a large step forward from the prior practice of institutionalizing children with the poor and feeble-minded or boarding them out as apprentices or indentured servants. In any event, it is by now well-settled that children are "persons" within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. *In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right to be heard before being "condemned to suffer grievous loss," *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The basis of this right is easily understood. A hearing dispels the appearance and minimizes the possibility of arbitrary or misinformed action. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). In cases such as these, the harmful consequences of a precipitous and perhaps improvident

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decision to remove a child from his foster family are apparent. Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents.

Intervenors dispute the seriousness of these losses, relying principally on a longitudinal study conducted by Professor David Fanshell of the Columbia University School of Social Work in which he concluded that there was no statistically significant correlation between a child's successful development and the number of times that child was moved within the foster care system. We find significant, however, Prof. Fanshell's further testimony that, "as a professional, [I] would be against the capricious movement of children." The requirement of a hearing is designed to insure no more.

Most specifically, a hearing is not, as intervenors apparently fear, intended in any way to impede the right of biological parents to regain custody of their children. The law in New York is clear: in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the "primacy of parental rights may not be ignored." *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 469 (1953); see also, *Spence-Chapin Adoption Service v. Polk*, *supra*. We do not, by our holding today, disturb that local judgment.¹³

Nonetheless, we are unable to agree with intervenors' contention that a hearing is therefore superfluous when a foster child is to be returned to his biological parents.

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Even under such circumstances, a hearing performs the salutary function of providing the agency with an organized forum in which to gather information concerning, inter alia, the frequency with which the biological parent has been visiting his or her child. If the evidence discloses that, despite the diligent efforts of the agency, the biological parent has failed for more than a year to maintain "substantial and continuous contact" with a child in foster care, permanent neglect proceedings may be instituted and the biological parent's presumptive right to custody may be forfeited. Family Court Act § 611, et seq.; *In re P.*, 337 N.Y.S. 2d 203 (Fam. Ct. N.Y.Co. 1972). A fortiori, when the question is whether a foster child is to be moved from one foster home to another, the state in its *parens patriae* capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented. The interest of the state, as *parens patriae*, is therefore compatible with, rather than antagonistic to, the requirement of a hearing. *Goldberg v. Kelly*, 397 U.S. at 265.

Plainly, the present pre-removal conference is not designed adequately to fulfill this data-gathering function. As outlined earlier, the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirements of procedural due process. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). We do not understand the defendants seriously to claim otherwise.

Rather, the state argues that any constitutional defect is remedied by the post-removal "fair hearing" provided under N.Y.C.R.R. § 450.14. We disagree. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v.*

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Shevin, 407 U.S. 67 (1972). It is, at the least, paradoxical to suggest that a hearing designed to forestall the hasty and ill-advised separation of a foster child from his foster home can occur after that separation has already taken place. We are unpersuaded by defendants' contention that a decision by the hearing examiner to reverse the agency's action and reunite the family effectively restores the status quo. Such a reunion may ameliorate but it cannot eradicate the injury caused by uprooting the child. Indeed, to the degree that implementation of the hearing examiner's decision requires the disruption of arrangements made in the interim, it may further exacerbate the child's sense of loss. It is in the best interests of the child that the risk of such dislocations be avoided or minimized.^{13a}

We find equally without merit intervenors' assertion that § 392 of the Social Services Law adequately protects the due process interests of the foster child. Enacted in 1971, § 392 provides for periodic review of the status of each foster child. One and a half years after being placed in foster care, and every two years thereafter, the Family Court is required to conduct a hearing upon notice to the biological parents, foster parents in whose home the child has lived for at least eighteen months, the child care agency to which the child has been surrendered, and "such other persons as the court may, in its discretion, direct." Following the hearing, an order must be entered incorporating one of four stated dispositional alternatives: that the child be continued in foster care, that he be returned to his natural parents, that proceedings be instituted legally to free him for adoption or, if legally free already, that he be placed for adoption with specified individuals.

Intervenors' contend that the above procedure, when coupled with the continued jurisdiction of the Family Court, Social Services Law § 392(10), fully satisfies constitutional requirements. We do not agree. Cf. *Boone v.*

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Wyman, 295 F.Supp. 1143 (S.D.N.Y. 1969), *aff'd*. 412 F.2d 857 (2d Cir. 1969), cert. denied 396 U.S. 1024 (1970).

First, and most obviously, § 392 offers no comfort whatsoever to the child in foster care for less than eighteen months. Second, intervenors' reasoning appears to rest upon an unjustifiably expansive interpretation of the scope of § 392. In *In re W.*, 35 N.Y.S.2d 245, 248 (Fam. Ct. N.Y. Co. 1974), the court concluded that the power to direct the child to be continued in foster care did not encompass the authority to order that the child be maintained in any specific foster home.

Third, and most fundamentally, intervenors assume an identity of interest between foster parent and foster child which we are unwilling to accept as we have already indicated by the appointment of separate counsel at the outset of this litigation. The continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action only if the proposed removal of the foster child is brought to the court's attention. Intervenors posit that the foster parents will perform this function. They may well be correct in the majority of cases. But we decline to rest the rights of the foster children upon the shoulders of foster parents who, however well-meaning, have a personal involvement and perhaps a financial interest¹⁴ which may color their conduct. If a hearing is required, as we hold it is, it is required in all cases and cannot be made to depend upon the initiative of third persons.¹⁵

A similar flaw taints the amended regulations promulgated by New York City during the pendency of this action. In most other respects, however, New York City's revised procedures represent a significant improvement over the agency conference and post-removal hearing envisaged by N.Y.C.R.R. § 450.14 and already discussed.

As of July 1, 1974, New York City has provided, at the foster parents' request, as a substitute for or supplement

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to the agency conference, a pre-removal "independent review" conducted "in accordance with the concepts of due process." Its salient features, as set forth in an internal memorandum of August 5, 1974, are as follows: (1) the review is heard before a supervisory official who has had no previous involvement with the decision to remove the child; (2) both the foster parents and the agency may be represented by counsel and each may present witnesses and evidence; (3) all witnesses must be sworn, unless stipulated otherwise, and all testimony is subject to cross-examination; (4) counsel for the foster parents must be allowed to examine any portion of the agency's files used to support the proposal to remove the child; (5) either a tape recording or stenographic record of the hearing must be kept and made available to the parties at cost; and (6) a written decision, supported by reasons, must be rendered within five days and must include a reminder to the foster parents that they may still request a post-removal hearing under N.Y.C.R.R. § 450.14.

While the amended regulations represent a considerable improvement over previous procedures, we note certain deficiencies still present in New York City's current practices. First, as alluded to above, the "independent review" now afforded by New York City is available only upon the affirmative request of the foster parents. We reiterate that such a restriction is inconsistent with our holding that it is the child's right to avoid arbitrary dislocations which necessitates a hearing. Whatever hearing is provided should be provided as a matter of course.

Second, New York's amended regulations have no applicability whatsoever when the child is to be returned to his biological parents. We see no basis for this distinction which, we believe, erroneously confuses the standard by which evidence is to be judged and the process by which it is gathered. No matter where he is to be placed,

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a well informed decision cannot but help to promote the child's "best interests," which all parties seek to advance.

Third, it is unnecessary and likely counterproductive to provide duplicate hearings, one pre-removal and a second after the event. We recognize that New York City was operating within the constraint of a statewide regulation, N.Y.C.R.R. § 450.14, which it had no authority to abrogate. We note, however, that the welfare of the child is best served by a speedy and final decision as to his fate.

Fourth, participation in New York City's "independent review" is limited to the foster parents and the agency representative. In order to insure that all relevant information is presented to the hearing examiner, the child and biological parent should be heard as well. Moreover, it may be advisable, under certain circumstances, for the agency to appoint an adult representative better to articulate the interests of the child. In making this determination, the agency should carefully consider the child's age, sophistication and ability effectively to communicate his own true feelings.

It is not, however, necessary that the chosen representative be an attorney. "The insertion of counsel . . . would inevitably give the proceeding a more adversary cast," *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), which as Mrs. Battenwieser points out, might well impede the effort to elicit the sensitive and personal information required. Thus, we do not hold that a trial-type hearing, such as that now provided in New York City, is constitutionally requisite. See *Morrissey v. Brewer*, 408 U.S. 471 (1972). Indeed, we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow

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the various defendants—state and local officials—the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion.

In summary, therefore, we conclude that New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defendants are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed unless and until they grant a pre-removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act § 1021.

The court thanks Mrs. Helen L. Battenwieser for her valuable assistance as assigned counsel.

Order to be taken on submission.

Dated: March 29, 1976.

J. Edward Lumbard
J. EDWARD LUMBARD
United States Circuit Judge

Robert L. Carter
ROBERT L. CARTER
United States District Judge

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FOOTNOTES

¹ Pursuant to the provisions of 28 U.S.C. § 2281, this three judge court was convened to consider plaintiffs' non-frivolous constitutional claims.

² In recognition of the independent position advanced by Mrs. Bittenwieser, the term "plaintiff" will be used throughout this opinion to refer only to OFFER and the foster parents although the foster children were also named in the complaint.

^{2a} In a separate order, filed concurrently with this opinion, Judge Carter has granted the motion of both plaintiffs and intervenors for class certification. The following parties are thus represented in the instant litigation: All foster parents who have had a foster child live with them continuously for over one year; all foster children who have lived continuously with their foster parents for over one year; and all natural parents who have voluntarily placed children in foster care.

³ As will be discussed more fully below, New York City has revised its procedures during the course of this litigation.

⁴ Authorized agency is defined in New York Social Services Law § 371 (10). It includes any local public welfare children's bureau, such as the defendants New York City Bureau of Child Welfare and Nassau County Children's Bureau, and any voluntary child-care agency under the supervision of the New York State Board of Social Welfare, such as the defendant Catholic Guardian Society of New York.

⁵ In October 1974, the New York State Department of Social Services prepared Program Analysis Report No. 56, entitled "Time Spent in Care by Children Served in the New York State Foster Care Program 1973." The report calculated that "[t]he median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.38 years," at p. 13. This raw statistic was placed in context by Prof. David Fanshell of the Columbia University School of Social Work who testified on the basis of his own longitudinal study that the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care. Professor Fanshell's study, conducted over a five year period, revealed a decline in discharge rate, as follows:

First year	24%
Second year	13%
Third year	8%
Fourth year	9%
Fifth year	7%

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⁶ Foster parents boarding children in their home must be licensed annually by an authorized agency pursuant to a legislative scheme set out in New York Social Services Law § 375, et seq.

⁷ See note 5, supra.

⁸ "The Court has frequently emphasized the importance of the family. The right to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights.' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

⁹ In Stanley, the Supreme Court invalidated a provision of Illinois law which made the children of unwed fathers wards of the State upon the death of the mother. The Court held that, absent a hearing, the state was prohibited from presuming that the father would be an unfit parent merely because he had never married.

¹⁰ The defendant Catholic Guardian Society currently pays foster parents \$155 per month for each foster child boarded in their home, in addition to an allowance for clothing, medical and dental expenses. This amount is typical of that paid throughout the state.

¹¹ Plaintiffs have introduced affidavits from similarly eminent experts equally fervent in their support of the concept of the "psychological family."

^{11a} Judge Pollack concludes his dissenting opinion with the observation that Social Services Law § 383(3) already "embodie[s] through the right of intervention" the requirement that a pre-removal hearing be provided if the foster child has lived with his foster parents for more than two years. This statement is incorrect. An examination of § 383(3) plainly reveals that while it grants to foster parents the right to intervene in any "proceeding"

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concerning the custody of foster children who have resided with them for twenty-four months or longer, it does not purport to create any substantive entitlement to a "hearing" or "proceeding" not elsewhere provided. Judge Pollack's contrary interpretation of the statutory language is moreover belied by the current practices of the defendants. Furthermore, the right to intervention granted by § 383(3) extends to the foster parents only and not to the children themselves.

We therefore emphasize once again that, with the exception of the recently amended regulations in effect in New York City, it is presently the law throughout New York State that a pre-removal hearing is unavailable regardless of the duration of the foster relationship being terminated.

¹² Our disposition of this case makes it unnecessary to decide the claim of the foster parents that the challenged statutes and regulations deprive them of the equal protection of the laws.

¹³ Accordingly, we see no basis for intervenors' doomsday projection that biological parents who might otherwise entrust their children to the foster care system will be discouraged from doing so, to the detriment of the child, by the decision in this case.

^{13a} Nor do we find anything to the contrary in the Supreme Court's recent holding that an evidentiary hearing is not required prior to the termination of disability benefits. *Mathews v. Eldridge*, 44 U.S.L.W. 4224 (February 24, 1976). Writing for the majority, Justice Powell emphasized the limited and financial nature of the deprivation there suffered by the plaintiff and the necessarily heavy reliance by the agency on medical documentation in reaching its decision. In contrast, the emotional trauma felt by a young child moved from a familiar home is pervasive and potentially devastating. Moreover, in determining whether the best interests of the child would better be served by his removal to another foster family, the social worker must weigh and evaluate a "wide variety of information," much of it subjective and some of it biased. 44 U.S.L.W. at 4232. A hearing provides the procedure for gathering and evaluating such data, thereby minimizing the risk of error.

¹⁴ See note 10, *supra*.

¹⁵ It is for this reason that we are unable to agree with intervenors' assertion that a constitutionally adequate recourse is provided the foster parents through a petition for habeas corpus or a petition for custody under Family Court Act § 651, even assuming, *arguendo*, that the above remedies would be available to a foster parent prior to the removal of the foster child.

Appendix "B", Dissenting Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

Before LUMBARD, Circuit Judge, and POLLACK and CARTER, District Judges.

Appendix "B", Dissenting Opinion.

APPEARANCES:

MARCIA ROBINSON LOWRY, Esq. and PETER BIENSTOCK, Esq., New York Civil Liberties Union, Attorneys for Plaintiffs Organization of Foster Families for Equality and Reform; Madeline Smith; Ralph and Christiane Goldberg; George and Dorothy Lhotan; on behalf of themselves and all others similarly situated,
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Appendix "B", Dissenting Opinion.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York and SAMUEL A. HIRSHOWITZ, First Assistant Attorney General,
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335 Broadway, New York, N.Y. 10013

AMENDED

POLLACK, District Judge (dissenting):

MP

This is a suit seeking declaratory judgment that New York Social Services Law §§ 383(2) and 400 and Title 18, New York Codes, Rules, and Regulations (N.Y.C.R.R.) § 450.14 are unconstitutional on their face and as applied and seeking injunctive relief against their enforcement. The complaint is grounded on allegations that the sections, which prescribe procedures for the separation of foster children from their foster parents, deprive plaintiffs of due process and equal protection in violation of the Fourteenth Amendment. For the reasons shown hereafter the complaint must be dismissed.

The present statutory scheme, applicable throughout most of the state, provides that the local Public Welfare Department or any authorized private agency acting on its behalf may, at any time up to two years after a child has been placed in foster care, in its discretion and on ten days' written notice, order the removal of any foster child from the foster home in which he or she has been placed.

Appendix "B", Dissenting Opinion.

SSL §§ 383(2), (3), 400 (1976 Supp.). Following notice of the impending removal, the foster parents may request a conference with a social services official and are given the reasons for removal and have an opportunity to express their views thereon. The child may not be removed from the foster home until three days after the conference. Written notice of the decision must be sent to the foster parents no later than five days after the conference which must contain advice of their right to appeal to the Department. N.Y.C.R.R. § 450.14(a-e). A decision to remove may be appealed to the Department, by "any person aggrieved", and the Department must review the case, give the appellant an opportunity for a fair hearing and render a decision within thirty days. SSL § 400(2) (1976 Supp.). A foster parent has been held to be an "aggrieved person" and where administrative remedies are finally exhausted, Court review is available by way of an Article 78 proceeding, CPLR 7800 *et seq.*, before the New York Supreme Court. *In re W*, 77 Misc.2d 374, 355 N.Y.S.2d 245 (Family Ct. N.Y. Co. 1974). Additionally, after 24 months of foster parentage the foster parents are granted the statutory right to "intervene" in any proceeding involving the custody of the child. SSL § 383(3) (1976 Supp.). Habeas corpus review is also presumably available at the instance of either the foster parent or the foster child. N.Y. CPLR §§ 7001 *et seq.*¹

The foster-parent-plaintiffs contend that these procedures deprive them of "liberty and property" interests without due process of law. The specific liberty interest which they assert is the right to familial privacy.

Plaintiffs insist that *after one year* of foster care, no child should be removed from a foster home without prior notice and an adversary hearing because emotional at-

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tachments have formed by that time which the state should not be at liberty arbitrarily to upset.

Plaintiffs-foster-parents initially sought to represent, as "next friend," the interests of their foster children as well. However, to forestall any possible conflict of interest, Judge Carter appointed Helen L. Bittenwieser as independent counsel for the foster children. In that capacity she has consistently argued that the foster parents have no constitutionally cognizable interest independent of those of the foster children and that an adversary hearing is not the proper forum to determine the "best interest of the child."

The plaintiffs-foster parents, in attempting in this action to obtain rights to certain procedures before a child may be removed from their home, no matter what the circumstances of the foster parents' home, are in effect seeking legislative relief.

Since the commencement of this law suit, New York City has revised its removal procedures when the child is to be placed somewhere other than with its own parents. These new procedures grant to foster parents most of the procedural protections requested by plaintiffs in this law suit: a foster parent receives detailed notice of the intent to remove a child, the reasons for the intended removal, and the right to a fair hearing by the City's Department of Social Services. The foster parents have access to Agency reports to be used at the hearing. Foster parents can present and cross-examine witnesses. The Agency determination must be based only on the record; its written decision must be served within five days of the hearing; and the child cannot be moved in the interim. A recording of the hearing is made and is available at cost.

All members of the Court agree that there is no merit in plaintiffs' argument that the realities of the foster care system, as presently administered in New York State,

Appendix "B", Dissenting Opinion.

justify the finding of an expectation akin to a "property interest" that their role as foster parents will not be abruptly and summarily terminated. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). Each foster parent signed, upon assuming responsibility for his or her respective foster child, a contract which reserves to the Agency the right to recall the child "upon request, realizing that such request will only be made for good reason."²

Moreover, plaintiffs' assertion that the foster home is entitled to the same constitutional deference as that long granted to the more traditional biological family because recent studies conclude that the "family" can best be conceived as a psychological entity, presents a novel question and an interesting social debate. The plaintiffs seemingly ask this Court to extend to them the due process protection afforded to the biological father of an illegitimate child in *Stanley v. Illinois*, 405 U.S. 645 (1972). Such an extension would adopt a principle that has long been anathema to the State's foster care policies. The psychological parent/child relationship is an amorphous one, not something that can be precisely defined or explained. The New York Courts have virtually unanimously refused the notion of "common law adoption" and have stated that, in absence of a statutory scheme, adoption—that is the means whereby the status or relationship of parent or child is created between persons not so related by nature—is not permitted. *Matter of Malpica-Orsini*, 36 N.Y. 2d 568, 570 (1975); *Landon v. Motorola, Inc.*, 38 A.D. 2d 18 (3d Dept. 1971).³

Having decided that the foster parents have no entitlement to their foster children, the Court declines to decide the debate surrounding the plaintiffs' requested extension of *Stanley v. Illinois*, *supra*; an extension which would invest plaintiffs with a "liberty" interest either in the children or the relationship itself. Instead of entering that

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debate, the Court departs from the better part of plaintiffs' claims, focused as they are on allegations of unconstitutionality from the viewpoint of the foster parents. The Court then rests its decision on a characterization of the foster children's interest that has been denied by the children's representative, Mrs. Bittenwieser. The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it. It holds over the objection of the representative of the children in this suit that the foster children have a "liberty" interest in their relationship with the foster parents. The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest.⁴ No one with standing to claim that the children require the due process protection sought herein is making that claim and, therefore, on well-settled principle it is not necessary or appropriate to reach that issue.

The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39; *Abrams v. Van Schaick*, 293 U.S. 188; *Wilshire Oil Co. v. United States*, 295 U.S. 100.

'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.' *Burton v. United States*, 196 U.S. 283, 295—*Ashwander v. Valley Authority*, 295 U.S. 288, 346-7 (1936) (Brandeis, J. concurring).⁵

On the basis of its resolution of this anticipated question the Court decides that the preremoval procedures presently employed by the State are constitutionally defective in that a child is entitled to a hearing "whenever and as soon as the child has been placed in a foster home for long term care or whenever, for any reason, he has re-

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maintained in a foster home for a period of one year or more." Pursuing this result which has every earmark of legislative action, the Court rules that "defendants are enjoined from removing any foster children from the foster homes in which they have been placed for long term care or in which they have lived for more than one year unless and until they grant a pre-removal hearing."*

Realizing that it is moving into uncharted seas, the Court states "we are reluctant to impose any pre-ordained structure upon the endeavor of trained social workers to evaluate the often ambiguous indices of a child's emotional attachments and psychological development. Rather, we believe the sounder course is to allow the various defendants—state and local officials—the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion."

This result will undoubtedly come as a surprise, if not a shock, to the parties. No one has contended for the view reached in the Court's opinion, except possibly to touch on the subject matter tangentially. The parties should certainly have been given a hearing (a briefing opportunity) on the point made by the opinion. They should have been alerted to the possibility that the Court might undertake to consider the "unconstitutionality" of the present procedures from the viewpoint of the foster children whose representative was not asserting any such contention.

If the Court must reach the interest of the children, it must face a situation in which at every step in the foster care system (whether before or after the 24 month period) the child is represented only by the State or by the foster parents. He receives no notice and has no independent

* The Court's draft opinion was as quoted above. It has since limited its holding to apply to only those foster children who have resided with one set of foster parents for at least a year. The dissent is nonetheless the same.

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representative at any stage; in short he has no independent role. Therefore, if the question were properly presented, the Court would have to decide whether or not the State, in its *parens patriae* capacity, acts as a sufficient representative for the child and whether or not the Due Process Clause mandates an adversarial hearing for foster children.

Since an independent representative for the child will inevitably be required, the Court has imposed on the delicate system of foster care an inapposite model for the application of the Due Process Clause; a model which requires the balancing of the individual's apparent need for procedural safeguards and the State's apparent need for summary action.⁶

The very structure of the State's foster care system belies the applicability of this model. In a system that at least purports (and the evidence herein shows that it actually does) represent "the best interests of the child" there can be no such facile distinction between the interest of the child, on the one hand, and that of the State, on the other. Unlike the traditional context in which the Due Process Clause has been litigated, there is no necessary opposition between the child and the State here. The State's professional social workers should not so easily be rejected as adequate representatives for foster children (if in this context the Due Process Clause requires strict "representation" at all). Their representation of those children has simply not, on the hearing of this case, been shown to be so inadequate as to require the introduction of a third party to represent the child.

The interests involved in this system of child care are too sensitive, too inchoate, to fit this old due process model; and there seems little doubt that this case presents a striking example of the need for flexibility in the application of the Due Process Clause.⁷ Neither the Court's adherence

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to the old Due Process approach by requiring an independent representative, nor its refusal to provide further guidelines for the type of hearing it envisions taps the potential for such flexibility.

If the Court has, in fact, improperly required a third party to represent the child, then the remainder of its analysis can only be described as legislation. In holding that the child's interest requires that the foster parents have a formal voice in any decision to remove the child after a year of foster parentage or whenever the child is placed with them for "long term care," the Court first undertakes to express a social policy preference for a one year rather than the present statutory two year period, and then hedges by promulgating a vague standard (as yet undefined in this system) apparently meant to test foster parent-child relationships from their incipency. There is no support for such a use of the Fourteenth Amendment.

Rather than relying on the disinterested social judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes, the Court's decision embroils the child in legalistic, psychological theorism; leaving the child a pawn in a game from which the child should be spared. No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child.

The right of cross-examination and discovery procedures, which would presumably now be afforded to foster parents after one year, have not been shown to be in the best interests of the child.

I do not imply in any wise that a child should not have the right to be heard—to participate. That is not what is at stake. The only question before the Court is whether layers of procedural obstruction should be afforded to

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the foster parents to impede judgments reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods. The pre-removal conference and the procedures leading thereto are not in any instance shown to have been defective from the viewpoint of the foster child. It is unrealistic to expect that a pre-teenage child, for example, is to invoke the "hearing" contemplated by the majority decision. And if an appointed adult representative is needed to articulate the interest of the child—the existing procedures accord the needed due process.

The State legislature which spawned the statutory scheme that makes the foster parent-child relationship possible has made the rational decision that until it is 24 months old this relationship can never be sufficiently strong to require pre-termination hearing protection. While not abdicating its constitutional responsibilities or improperly deferring to a state legislature, the Court should not overturn the legislature's decision absent adequate proof that it is irrational or unfair. In short, it can recognize the State legislature's superior fact-finding ability and it can agree with that legislature's decision without avoiding its obligation to determine what does and does not satisfy the Due Process Clause.

The Supreme Court has warned against a return to the days of substantive due process.

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . We have returned to the original constitutional proposition that courts do not substitute their social and

Appendix "B", Dissenting Opinion.

economic beliefs for the judgment of legislative bodies, who are elected to pass laws we refuse to sit as a "super legislature to weigh the wisdom of legislation," [citation omitted] and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." [citation omitted] The . . . statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State *Ferguson v. Skrupa*, 372 U.S. 726, 729-732 (1963).

This warning applies equally well to the social as to the economic sphere. While (in the first two years of foster parentage) it may conceivably be wiser to hold a pre-termination hearing to hear the parties out, it is not, thereby, constitutionally required. The evidence has not shown that, during those first two years, the foster parents and the foster child are not afforded adequate due process. The choice of providing a pre-termination hearing after one year of foster parentage rather than the two year period now embodied in SSL § 383(3) through the right of intervention, is a choice that seems particularly legislative in character.

I would dismiss the complaint.

s/ MILTON POLLACK

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FOOTNOTES

¹ Under Social Services Law § 392 (1976 Supp.) the New York Family Court is required to hold a hearing to review the foster care status of any foster child after 18 months of continuous care in the same foster home and, then, at least every 24 months. The foster parents are made parties "entitled to participate in this proceeding." § 392(4) (1976 Supp.).

² The statutes outlined above and under attack here also fairly put the foster parents on notice of the State's right to summarily remove the child from the foster home within 24 months of foster parentage. Of course, the observations in the text above are principally relevant with respect to an assertion of an "entitlement" to the children or the foster parent-child relationship. Such a property-like interest is to be distinguished from an assertion of a "liberty" interest similar to that asserted in *Stanley v. Illinois*, 405 U.S. 645 (1972).

³ The Appellate Division of the Second Department has recently refused to reverse a Trial Term decision ordering two of the plaintiffs in this action to return their foster children to their natural mother. *State of New York ex rel. Wallace v. Lhotan et al.*, N.Y.L.J. March 1, 1976, p. 2, col. 1 (2d Dept., Feb. 23, 1976), affirming, 48 A. D.2d 665 (Sup. Ct. Nassau Co. 1975). In that decision the Court discussed part of the rationale behind the rejection of the concept of common-law adoption in the case of foster parents.

. . . . the foster parents must make a serious attempt to encourage, not discourage, the improvement of relations between the children under their charge and a mother who is trying to reestablish the bonds of family love and concern. A portion of the love that foster parents have for the children must be directed towards easing their return to their natural parent. Whatever circumstances will rend the family fabric, it should not be the result of actions of the foster parents, who have taken on their delicate responsibilities on the solemn promise to do otherwise.

So it is that foster parents are charged with the duty to avoid forming the very psychological relationship which they present here as a justification for a pre-removal hearing.

⁴ The Supreme Court has frequently expressed the general rule that one person does not have standing to assert the constitutional rights of another. *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943). See generally, *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Barrows v.*

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Jackson, 346 U.S. 249 (1953). In light of the representation of the children by Mrs. Bittenwieser and the Court's holding that an independent representative is required for the foster child at the due process hearing it orders, there can be no grounds for waiving this general rule in this case.

By its appointment of Mrs. Bittenwieser the Court has recognized the severability of the claims of foster parents and the foster children. See Rule 17(c), Fed. R. Civ. P.; Wright and Miller, *Federal Practice and Procedure*, § 1570 at 774 (1969). Therefore, the foster parents cannot now be invested with standing as an exception to the *Raines* rule on the grounds that their interests are not severable from those of the children. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606 *et seq.* (1962); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

The Court's recognition of some interest in the child other than that asserted by their independent representative herein betrays a significant confusion over the question of when a child does and does not require independent representation under the Due Process Clause. Apparently a child requires an independent representative in the hearing required by the Court despite the views of the children's independent representative in the hearing of this action.

In short, allowing foster parents standing here to assert the interest of the child seriously undermines the Court's later finding that the child requires representation independent of the foster parents at a due process hearing.

⁵ This principle of constitutional jurisprudence is precisely the authority invoked by the Court in its avoidance of the debate surrounding plaintiffs' analogy to *Stanley v. Illinois*, *supra*. See generally *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947).

⁶ See *Bell v. Burson*, 402 U.S. 535 (1971); *Richardson v. Perales*, 402 U.S. 389 (1971); Note, *Specifying the Procedures Required By Due Process: Toward Limits on the Use of Interest Balancing*, 88 Harv. L. Rev. 1510 (1975).

⁷ "... the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. ... what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. ... '[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

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circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .'⁸ *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162-163 (concurring opinion).⁹ *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 894-895 (1961); *Frost v. Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975). See Friendly, H.J., "Some Kind of Hearing", 123 U.Pa. L.Rev. 1267 (1975); Frankel, M. *The Search for Truth: An Umpireal View*, 1031, 1036 (1975).

Appendix "C", Order and Judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenors-Defendants.

This cause having come on to be heard on plaintiffs' application for injunctive and declaratory relief, and this court having held a hearing on March 3, 1975, and briefs

Appendix "C", Order and Judgment.

and depositions having been submitted, and a decision having been filed on March 22, 1976, it is hereby

ORDERED and adjudged that:

(1) New York Social Services Law §§ 383(2) and 400, and N.Y.C.R.R. § 450.14 as presently applied are unconstitutional, in violation of the constitutional rights of foster children in the certified class; and

(2) Defendants are permanently enjoined from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continuously for more than one year, without notice and hearing at which the foster parents, the foster child and the biological parents may present any relevant information to the administrative decisionmaker charged with determining the advisability of such removal; and

(3) At hearings such as referred to in the preceding paragraph, defendants shall appoint a disinterested adult to represent the child whenever the defendants, in their informed discretion, determine that the child's age, sophistication and ability effectively to communicate his or her own true feelings warrant such an appointment; and

(4) Said hearings need not be held when the foster child is to be removed pursuant to the order of any court of competent jurisdiction, or at the request of the foster parent; and

(5) Said hearings need not be held in emergency situations when the health or welfare of the foster child is imminently threatened; and

(6) Procedures appropriate to the circumstances, and consistent with the foregoing, shall be promulgated and published by the defendants; and

Appendix "C", Order and Judgment.

(7) The effective date of this order and judgment shall be stayed for 30 days to permit application to a Justice of the Supreme Court of the United States for a further stay pending appeal to the Supreme Court of the United States; and

(8) All motions for rehearing are denied except that the clerk of the district court is directed to strike from the last page of the opinion the words: "Family Court Act § 1021."

Dated: April 14, 1976.

J. EDWARD LUMBARD
J. EDWARD LUMBARD
United States Circuit Judge

MILTON POLLACK
United States District Judge

ROBERT L. CARTER
ROBERT L. CARTER
United States District Judge

I dissent from the foregoing except paragraphs #7 and #8.

MILTON POLLACK
United States District Judge

Judgment Entered—4/14/76
RAYMOND F. BURGHARDT
Clerk

Appendix "D", Notices of Appeal to the Supreme Court of the United States.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 (RLC)

(3 Judge Court)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Plaintiffs,

against

JAMES E. DUMPSON, individually and as Administrator of
the New York City Human Resources Administration,
et al.,

Defendants.

SIRS:

NOTICE is hereby given that Bernard Shapiro and Abe Lavine, defendants in the above-captioned matter, hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§ 383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. § 450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and defendants hereby appeal from each and every part of said order except so much as stays the effective date for 30 days.

*Appendix "D", Notice of Appeal to the Supreme
Court of the United States.*

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 10, 1976

Yours, etc.,

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By

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*Appendix "D", Notice of Appeal to the Supreme
Court of the United States.*

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By: James Gallagher, Esq.

**Notice of Appeal to the Supreme Court
of the United States.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 (RLC)
(3 Judge Court)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Plaintiffs,

against

JAMES E. DUMPSON, individually and as Administrator of
the New York City Human Resources Administration,
et al.,

Defendants.

SIRS:

NOTICE IS HEREBY GIVEN that Danielle and Eric Gandy, Rafael Serrano and Cheryl, Patricia, Cynthia and Cathleen Wallace, the infant Plaintiffs herein hereby appeal to the Supreme Court of the United States from the final order and judgment of the three-judge court entered in this action on April 14, 1976 declaring §§ 383(2) and 400 of the New York Social Services Law and N.Y.C.R.R. § 450.14 unconstitutional as presently applied, and granting permanent injunctive relief, and plaintiffs hereby appeal from each and every part of said Order except so much as stays the effective date for 30 days.

*Notice of Appeal to the Supreme Court
of the United States.*

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
June 11, 1976

Yours, etc.,

HELEN L. BUTTENWIESER
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Attorney General of the State of New
York
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Lavine
Office and P.O. Address
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By: Mark C. Rutzick
Assistant Attorney General

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Attorney for Defendants
James Dumpson and Elizabeth Beine
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By: Elliott Hoffman, Esq.
Assistant Corporation Counsel

*Notice of Appeal to the Supreme Court
of the United States.*

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and TOBY GOLICK, Esq.
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N.Y. Civil Liberties Union
Organization of Foster Families
for Equality & Reform; Madeline
Smith, Ralph and Christiane Gold-
berg; George & Dorothy Lhotan;
on behalf of themselves and all
others similarly situated
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Notice of Appeal.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND RE-
FORM; MADELINE SMITH, on her own behalf and as next friend of
DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE
GOLDBERG, on their own behalf and as next friend of RAFAEL SER-
RANO; and GEORGE and DOROTHY LHOTAN, on their own behalf
and as next friend of CHERYL, PATRICIA, CYNTHIA and CATH-
LEEN WALLACE, on behalf of themselves and all others similarly
situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK
CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH
BEINE, individually and as Director of the NEW YORK CITY BU-
REAU OF CHILD WELFARE, and as Acting Assistant Administrator
of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN;
ADOLIN DALL, individually and as Director of the DIVISION OF
INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD
WELFARE; and JAMES P. O'NEILL, individually and as Executive
Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK;
BERNARD SHAPIRO, individually and as Executive Director of the
New York State Board of Social Welfare; ABE LAVINE, individually and
as Commissioner of the New York State Department of Social Services,
and JOSEPH D'ELIA, individually and as Commissioner of the Nassau
County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY
NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of them-
selves and all others similarly situated,

Intervenor-Defendants.

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that Naomi Rodriguez, Mary
Robins, Dorothy Nelson Shabazz, and Lillian Collazo,
Intervenor-Defendants above named, on behalf of them-
selves and all others similarly situated, appeal to the
Supreme Court of the United States from the judgment

Notice of Appeal.

and order of the three-judge district Court (Pollack, D.J., dissenting) entered in this class action on April 14, 1976, wherein the district Court declared unconstitutional and enjoined the enforcement of New York Social Services Law Sections 383(2) and 400 and New York Codes Rules and Regulations (N.Y.C.R.R.) 450.14, to the extent said statutes and regulation were applied by Defendants to move children from foster homes in which they had been placed for "a year or more," without affording to the children, in every case, notice and a prior hearing with respect to the propriety of the proposed move.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, New York
June 10, 1976

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Notice of Appeal.

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**Notice of Appeal to the Supreme Court
of the United States.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010
(R.L.C.)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SER-RANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATH-LEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BU-REAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of them-selves and all others similarly situated,

Intervenor-Defendants.

SIRS:

NOTICE is hereby given that the defendants James Dumpson, Elizabeth Beine, and Adolin Dall hereby appeal to the Supreme Court of the United States from the order and judgment entered herein in the Office of the Clerk

of the United States District for the Southern District of New York on April 14, 1976 wherein it is adjudged that New York Social Services Law §§ 383 (2) and 400 and N.Y.C.R.R. § 450.14 as presently applied are unconstitu-tional.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Yours, etc.,

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By
CARL SANDERS

June 9, 1976.

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Madeline Smith
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*Notice of Appeal to the Supreme Court
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Appendix "E", Opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO; and GEORGE and DOROTHY LHOTAN, on their own behalf and as next friend of CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Plaintiffs,

against

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

Appendix "E", Opinion.

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Appendix "E", Opinion.

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By Samuel A. Hirshowitz, Esq.,
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Stanley L. Kantor, Esq.
Attorneys for Defendants Bernard Shapiro and Abe Lavine

CARTER, District Judge

OPINION

I

Plaintiff foster parents have moved, pursuant to Rule 23, F.R.Civ.P., to certify as a class all foster parents having a foster child who has lived continuously with them for over one year. Prior to the appointment of separate counsel, plaintiff foster children had moved for certification as a class all foster children who have lived continuously with their foster parents for over one year. In addition, intervenor-defendants have asked the court to certify as a class all natural parents who have voluntarily placed children in foster care. Since each class satisfies the requirements of Rule 23(a) and 23(b)(2), F.R.Civ.P., the motions are granted.

Appendix "E", Opinion.

A. Numerosity (Rule 23(a)(1))

As of September 30, 1973, there were 32,115 children in foster care with a family in New York State. New York State Department of Social Services, *Social Statistics, A Monthly Summary*, Vol. XXXV, No. 10, (Oct. 1973).¹ The number of children who, at any one time, are with a foster family with whom they have been living continuously for more than one year is fixed, but not easily ascertainable. Plaintiffs estimate that one-half of those children in foster care are so situated. Even if the figure were closer to one-tenth there would be a sufficient number of class members to make joinder impracticable. Likewise, however one estimates the number of foster parents with whom these children have been living, the total seems bound to satisfy the numerosity requirement. Indeed, the standard under Rule 23(a)(1) is the impracticability of joinder, *see generally* 7 Wright & Miller, *Federal Practice and Procedure* § 1762 (1972), and the difficulty of identifying class members is a factor the court may consider, along with numerosity, in determining the feasibility of joining all parties. *Poe v. Menghini*, 339 F. Supp. 986, 990 (D. Kan. 1972); *see Yaffe v. Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1972). While normally greater exactness in the computation of the size of a class should be demanded of a party, *Demarco v. Edens*, 390 F. 2d 836, 845 (2d Cir. 1968), in this case there can be no doubt that the two groups are sufficiently large. It is also unlikely that either class is too large to be maintainable, *see e.g., Almenares v. Wyman*, 334 F. Supp. 512, 518 (S.D.N.Y.), *modified on other grounds*, 453 F. 2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), especially since there is no claim for damages.

¹ Recent data shows that this figure has remained fairly constant. As of July 1975, 31,224 children were so situated. New York State Department of Social Services, *Social Statistics, A Monthly Summary*, Vol. XXXVII, No. 8 (Aug. 1975).

Appendix "E", Opinion.

Intervenors estimate that at least 7,800 parents have signed voluntary release forms placing their children in foster care. While their method of computation seems no more exact than that of plaintiffs, it is not challenged by any other party. And once again, the size of the foster care system makes it unquestionable that it affects many people in the ways challenged in this suit.

B. Common Question of Law or Fact (Rule 23(a)(2))

The challenged statutes and regulations are of state-wide application. The procedures have been altered in New York City, but that action was taken under the authority of the existing statute and regulations which continue to have force throughout the state and the abandoned procedures could easily be reinstated.²

There can be no doubt that each member of each class faces a question of law identical to that faced by every other member of the class. If the statutory or revised New York City procedures are constitutionally deficient, as plaintiff foster parents assert, the defects strike all equally. Class action status is frequently deemed appropriate in cases such as this challenging the propriety of state or federal law. *See, e.g., Frost v. Weinberger*, 375 F. Supp. 1312, 1317 (E.D.N.Y. 1974), *rev'd on other*

² Alternatively, since plaintiffs contend that the revised New York City procedures are inadequate under Fourteenth Amendment strictures as well, each proposed class could be viewed as composed of two subclasses—those subject to the revised New York City procedures, and those living in the remainder of the state. *See* Rule 23(c)(4), F.R.Civ.P. However, since the interests of these groups are not antagonistic, *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239, 247-48 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), and since only one statutory scheme is challenged, *Wolfson v. Solomon*, 54 F.R.D. 584, 588 (S.D.N.Y. 1972), there is no need to certify subclasses.

Appendix "E", Opinion.

grounds, 515 F. 2d 57 (2d Cir. 1975); *United States ex rel. Walker v. Mancusi*, 338 F. Supp. 311, 315-16 (W.D.N.Y. 1971), *aff'd on other grounds*, 467 F. 2d 51 (2d Cir. 1972).

C. *Representative Parties' Claims or Defenses
Typical of the Claims or Defenses of the
Class (Rule 23 (a)(3))*

As described in Judge Lumbard's opinion on the merits filed today, the foster parents who would represent a class all fear, with varying degrees of immediacy, the removal without prior hearings of foster children who have lived with them continuously for more than one year. The named children face the possibility of being moved without the procedural protections to which they may be entitled. The intervenors all have children currently in the foster care system. They all voice a concern that any changes in the present system will adversely affect them in ways that would be the same for all other parents who have voluntarily placed children in foster care. They are all, therefore, typical of the classes they seek to represent. *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), *appeal dismissed*, 496 F. 2d 1094 (2d Cir. 1974).

D. *Fair and Adequate Protection of the Class'
Interests (Rule 23(a) (4))*

Counsel for each of the representative parties have assiduously advocated the rights of those before the court and of the class members not present. I would particularly like to thank court-appointed counsel, Helen Bittenwieser, for undertaking the burden assigned to her and for a well conceived and helpful presentation of her understanding of the scope and reach of the rights of foster children.

Appendix "E", Opinion.

E. *Action or Inaction on Grounds Generally
Applicable to Class—Appropriateness of
Injunctive or Declaratory Relief (Rule 23
(b)(2))*

Plaintiff foster parents have asked for declaratory and injunctive relief that would establish for them certain procedural safeguards before a foster child can be removed from their care. Both counsel for the foster children, and counsel for intervenors have opposed this relief. No damages are sought. This situation is ideally suited for class action treatment under subdivision (b)(2) of Rule 23, F.R.Civ.P., since the decision of the court will have a similar impact on broad groups of people. In fact, this is the kind of situation envisioned by the drafters of Rule 23. See *Advisory Committee Notes to Rule 23, F.R.Civ.P.* and cases cited therein; *Escalera v. New York City Housing Authority*, 425 F. 2d 853, 867 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970); *Agron v. Montanye*, 392 F. Supp. 454, 455 (W.D.N.Y. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 386-87 (M.D. Ala. 1974). Since class action treatment is so clearly appropriate under subdivision (b)(2), I do not need to consider whether any of these classes might also be proper under (b)(1).

F. *Notice*

There has been no opportunity for notice to the class, but that is immaterial since notice is no longer required in 23(b)(2) class actions in this circuit, *Frost v. Weinberger, supra*, 515 F. 2d at 64-65; and in a case such as this, where the court is in a position to determine that the various arguments of the classes have been effectively presented, notice is not needed. *Wetzel v. Liberty Mutual Insurance Co., supra*, 508 F. 2d at 254-57; *Baxter v. Savannah Sugar Refining Corp.*, 350 F. Supp. 139, 141 (S.D. Ga.

Appendix "E", Opinion.

1972), *aff'd in part, rev'd in part on other grounds and remanded*, 495 F. 2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Citizens Environmental Council v. Volpe*, 364 F. Supp. 286, 288 (D. Kan.), *aff'd*, 484 F. 2d 870 (10th Cir. 1973). All three classes, therefore, are appropriate for class certification.

II.

Intervenor-defendants have moved pursuant to Rule 15, F.R.Civ.P., to amend their complaint, and also ask under Rule 21, F.R.Civ.P., to be allowed to join an additional party.

The motion to amend is granted and the proposed amended intervenor-complaint is accepted, including the first thirteen affirmative defenses, but not including affirmative defenses 14 and 15, or the proposed cross-claim. In a previous order, intervenors were given permission to assert the rights of the natural parents of children in foster care, but only in respect of those issues raised in plaintiffs' second amended complaint. Order of August 15, 1974. Intervenor's affirmative defenses 1-13 are genuinely responsive to plaintiffs' lawsuit and should be considered as part of this case. Affirmative defenses 14 and 15 raise issues similar to those rejected in the order of August 15, 1974 as likely to expand the scope of the lawsuit. For example, intervenors assert that, for a number of reasons, natural parents do not give informed consent when they place children in the foster care system.

Likewise, intervenors' proposed cross-claim seeks to expand the issues of this lawsuit. As is amply demonstrated by the allegations in the cross-claim, intervenors again seek to raise questions concerning the placement of children in foster care, and the relationship between natural parents and the foster care system. Intervenor's have not narrowed

Appendix "E", Opinion.

their cross-claim to deal with the rights of natural parents, if any, that are or might be infringed were the three-judge court to grant increased procedural rights to plaintiff foster parents or foster children.

Intervenor's move that Lillian Collazo be joined as an additional party. That motion is granted. Ms. Collazo is the natural parent of a child in the foster care system. She has a legitimate concern with the procedures that guide that system, and therefore the questions of law raised in this case apply to her as well as to the other intervenor-defendants. Rule 20(a), F.R.Civ.P.

In sum, the motions to certify a class of plaintiff foster parents, plaintiff foster children, and intervenor-defendant natural parents are granted. Intervenor's motion to amend their complaint is granted except for affirmative defenses 14 and 15 and the cross-claim, which are not allowed; and intervenor's motion to join an additional party is granted.

So ORDERED.

Dated: New York, New York
March 22, 1976

Robert L. Carter
ROBERT L. CARTER
U. S. D. J.

Appendix "F", New York Law and Regulations.

New York Social Services Law

§ 383

2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

§ 400. Removal of children

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

18 New York Code Rules and Regulations

§ 450.10 Removal from foster family care. (a) Whenever a social services official of another authorized agency

Appendix "F", New York Law and Regulations.

acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written

Appendix "F", New York Law and Regulations.

notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

Appendix "G", Opinion.**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; and DOROTHY NELSON SHABAZZ, on behalf of themselves and all others similarly situated,

Intervenor-Defendants.

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Appendix "G", Opinion.

Organization of Foster Families for
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Appendix "G", Opinion.

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OPINION

*The Decision to Appoint Separate
Counsel for the Children*

Plaintiffs brought this class action pursuant to 42 U.S.C. § 1983 seeking a declaration that Sections 383(2) and 400 of the New York Social Services Law and 18 N.Y.C.R.R. 450.14 violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. The complaint also requests that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 and that the defendant agencies and officers be enjoined from enforcing the statutes and regulation. The three-judge court was appointed by an order dated June 27, 1974.

Plaintiffs Madeline Smith and Ralph and Christiane Goldberg are foster parents who have taken children into their homes and cared for them under the program provided by the New York Social Services Law. The complaint alleges that Mrs. Smith and the Goldbergs are members of two sub-classes which together are comprised of over one thousand foster parents who have cared for foster children continuously for more than one year. (Second Amended Complaint, Paragraph 6 (hereinafter "Complaint")). Pursuant to Rule 23(a) (3), it is alleged that the claims of these plaintiffs are typical of the claims of all foster parents "who are in jeopardy of having [foster] children summarily removed pursuant to . . . New York Social Services Law §§ 383(2) and 400, and 18

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NYCRR 450.14, which violate their constitutional rights to due process and [e]qual protection of the law." (Complaint, Paragraph 8).

Plaintiffs Danielle and Eric Gandy, who are six and nine years old respectively, are the foster children of Mrs. Smith. Rafael Serrano, eleven years old, is the foster child of the Goldbergs. These children, who appear by their foster parents as next friends, claim to represent a sub-class of over one thousand foster children who have been in the same foster homes for more than one year. (Complaint, Paragraph 7). It is alleged that their claims are typical of those of foster children "who have been placed in stable, loving foster homes, and who are in jeopardy of losing what has become their family through the arbitrary, standardless procedures authorized by [the statutes and regulation here challenged]." (Complaint, Paragraph 10).

The same counsel from the New York Civil Liberties Union originally represented both the named foster parents and their class and the named foster children and their class. Furthermore, the Civil Liberties Union counsel proceeded on behalf of both groups with a single set of pleadings.

The question of a possible conflict of interest between the foster parents and the children was raised in a hearing before this court on August 5, 1974. After consulting with my two colleagues on the three-judge court, I decided that in view of the potential conflict, separate counsel should be appointed for the children. On October 25, 1974, counsel for all parties were convened and informed of my decision and of my tentative choice of Helen L. Bittenwieser, Esq., to represent the children. At the meeting of counsel, Marcia R. Lowry, Esq., of the Civil Liberties Union first informed me that if she were required to choose between the foster parents and the children, she would prefer to con-

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tinue to represent the children. She stated that she had made a personal commitment to the named children to represent them and that the foster parents had, from the outset, expressed their willingness to obtain separate counsel for themselves should a conflict arise. I indicated at that time that I thought that the decision to appoint independent counsel for the *children* was correct. My selection of Ms. Bittenwieser was confirmed by letter to all counsel on October 29, 1974.

The Civil Liberties Union brought on the instant motions by an order to show cause dated November 7, and oral argument was heard on November 15. The Civil Liberties Union lawyers seek an order pursuant to Rule 17(c), F.R.Civ.P., continuing the Civil Liberties Union as counsel to the foster children and requiring the foster parents to secure substitute counsel. In the alternative, the Civil Liberties Union counsel move for an order pursuant to Rule 17(c) appointing Dr. Kenneth Clark as guardian *ad litem* to the children. Both motions are denied.

The Pleadings Filed by the Civil Liberties Union Necessitated the Appointment of Separate Counsel for the Children

The primary reason for the original decision to appoint separate counsel for the children was the court's concern over the potential conflict of interest between the foster parents and the children.

The decision to replace the Civil Liberties Union as counsel for the children, rather than require the foster parents to obtain separate counsel, was based on the court's determination that the Civil Liberties Union could not adequately protect the interests of the children under the pleadings it had filed. Upon examination of the pleadings, the court was most concerned that all of the allega-

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tions of the complaint were based on the uncritical assumption that the rights and interests of the children are identical to those of the foster parents. After claiming that each of the challenged procedures violated a particular right of the foster parents, the complaint alleged that the procedure violated precisely the same right of the foster children. The complaint made no mention whatever of possible interests of the children which might be adverse to those of the foster parents.

It appeared to the court that the effect of these pleadings was to align the children squarely with the foster parents. If the Civil Liberties Union were to proceed on behalf of the children under pleadings which assumed that the interests of the children and the foster parents were identical, the result would be to foreclose litigation of any dispute between the children and the foster parents. Accordingly, it seemed essential that separate counsel be obtained for the children, rather than for the foster parents, and that the substitute counsel for the children file a fresh set of pleadings.

The complaint alleges that one of the defendant agencies arbitrarily decided to remove the children, Eric and Danielle Gandy, from plaintiff Madeline Smith's home, and that although Mrs. Smith was notified of the agency's decision, she was not informed of the reasons therefor. Plaintiffs also claim that since the administrative conference procedure offered to Mrs. Smith under 18 N.Y.C.R.R. 450.14 is not regulated by written standards, it did not satisfy due process. (Complaint, Paragraphs 22-41)

The complaint also alleges that another of the defendant agencies plans to remove Rafael Serrano from the Goldbergs' home according to the same procedure. (Complaint, Paragraphs 42-57)

Plaintiffs claim further that the notification and administrative conference procedures violate the rights of Mrs. Smith, the Goldbergs and members of their class not to be

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deprived without due process of the "fundamental right to establish a home and bring up children" and of their rights under the Fourteenth Amendment generally. (Complaint, Paragraphs 59-61)

The paragraphs that follow allege violations of the foster parents' and the children's rights in practically identical terms. With respect to the foster parents, it is alleged that § 383(2) is "unconstitutionally vague" and violates their "fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment." (Complaint, Paragraph 63) The allegations on behalf of the foster children respecting § 383(2) are identical in substance and in language, except that the references to establishing a home and bringing up children have been deleted. (Complaint, Paragraph 64) In identical language, it is alleged that § 400 of the Social Services Law violates the constitutional rights of foster parents and children. (Complaint, Paragraphs 66 and 67)¹

The balance of the allegations in the complaint also assume that the rights and interests of the foster parents and the children are identical. Thus it is alleged that the absence of regulations interpreting §§ 383(2) and 400, the administrative conference procedure, and the "internal procedure" adopted by defendant Dumpson and his agents in June of 1974, violate the constitutional rights of all "plaintiffs and members of their class." (Complaint, Paragraphs 68, 72 and 73) The complaint claims further that the discretion given to private child-care agencies and the absence of any provision for a post-removal hearing for foster parents under the supervision of such private agencies deprive "plaintiffs Madeline Smith and Eric and Danielle

¹ Paragraph 64 refers only to Rafael Serrano, while Paragraph 67 refers to all three named children.

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Gandy and members of their class" of their rights under the Due Process and Equal Protection Clauses. (Complaint, Paragraphs 69 and 70) Two paragraphs allege in identical language that the absence of a prior hearing violates the Fourteenth Amendment rights of the named children and members of their class and the named foster parents and members of their class respectively. (Complaint, Paragraphs 76 and 77)

In addition to declaratory relief, the complaint requests that the defendants be enjoined from removing children who have lived with foster parents for more than one year without the "due process safeguards of adequate and specific notice and a prior hearing."

The Decision to Appoint Separate Counsel Reaffirmed

The Civil Liberties Union requests that the court reverse its appointment of Ms. Bittenwieser as counsel for the children and reinstate the Civil Liberties Union.

Under Rule 17(c), the court is authorized and directed to make "such . . . order as it deems proper for the protection" of the foster children.² The court made the required determination as to the best means of protecting the children when it made the initial decision to appoint Ms. Bittenwieser as separate counsel. On this motion under Rule 17(c), it has re-examined its conclusion. As set forth more fully below, the court remains convinced that

² The full text of the third sentence of Rule 17(c) is as follows:

"The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The fact that the children were already represented at the time of Ms. Bittenwieser's appointment did not preclude this court from making the appointment. See *Zaro v. Strauss*, 167 F. 2d 218, 220 (5th Cir. 1948) (appointment of guardian *ad litem*); 6 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1570, (1972 ed.).

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there exists a potential conflict of interest between the foster parents and the children, and that the Civil Liberties Union cannot adequately protect the interests of the children under the pleadings it has filed.

In addition to its duty under Rule 17(c), since this is a class action, the court is subject to a duty under Rule 23(a) (4) to insure that plaintiffs will "fairly and adequately protect the interests of the class" of foster children. The determination required by Rule 23(a) (4) is left to the discretion of the trial court, *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 470 (S.D.N.Y. 1968), and an appellate court will not reverse the lower court's determination "in the absence of improvident action." *Peelias v. Caterpillar Tractor Co.*, 113 F. 2d 629, 633 (7th Cir. 1940), *cert. denied*, 311 U.S. 700 (1940).

Rule 23(a) (4) requires, *inter alia*, that the court assure itself that counsel for the representative parties will prosecute the action vigorously on behalf of the class. See *Herbst v. Able*, 47 F.R.D. 11, 15 (S.D.N.Y. 1969); *Fogel v. Wolfgang*, 47 F.R.D. 213, 216 (S.D.N.Y. 1969).

Ordinarily this issue would be resolved as a part of the court's decision on plaintiffs' pending motion for a class action determination. However, the issue of the children's counsel should be settled prior to the hearing before the three-judge court on the class action and other motions so that the children may be fully represented at that hearing. In *Doe v. Norton*, 365 F. Supp. 65, 69 (D. Conn. 1973), the plaintiff unwed mothers and illegitimate children challenged the constitutionality of certain Connecticut welfare legislation before a three-judge court. Prior to the decision on the class action motion by the three-judge court, Judge Blumenfeld considered such class action questions as typicality and adequate representation, and, on his own motion, appointed separate counsel for the children. His decision was based on a finding that "some of the interests which the mothers urge relating to the

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subject matter of this action are neither typical of nor congruent with the interests of their children, but actually conflict with them in several respects." 365 F. Supp. at 69.

For similar reasons, I have decided to deny the motion of the Civil Liberties Union in the instant case, and, pursuant to my power under Rules 17(c) and 24(a)(4), I reaffirm the appointment of Ms. Bittenwieser as independent counsel to the children.

The case is of vital importance to the well-being of more than one thousand children. In the course of this litigation, it is essential that the court make a thorough and searching examination of the interests of the natural parents, foster parents, the children and the public. The interests of all parties other than the children are well represented by counsel in this proceeding. Therefore, the court must look to and rely heavily on the children's counsel to articulate and define their interests. The children's counsel must advocate the rights of the children and the children alone, vigorously, independently, and without regard to the interests of any other party to the action.

After re-examining the complaint, the court remains convinced that its primary objective is to secure the foster parents' claimed "fundamental rights to establish a home and bring up children." The result is that the interests of the children are asserted only insofar as they coincide with the foster parents' interests.

The complaint and motion papers filed by the Civil Liberties Union fail to give proper consideration to several possible conflicting interests of the children which have been suggested by other parties to this litigation. For example, it has been suggested that the notice and hearing procedures proposed by the plaintiffs may prevent the expeditious removal of a child in an emergency situation where the foster parents are unfit to care for the child. The court must consider the situation where it is in the interest of the child to leave the foster home as quickly

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as possible to return to his natural parents or to take advantage of a scarce place in a special school. The attachment of the foster children to their natural parents should be considered. Finally, the court must assess the possibility that a child's needs and desires may be determined more effectively through examination by the trained personnel provided by state social welfare agencies than through an adversary hearing.

Considerations such as these have hitherto been advanced by one or another of the defendants, who, like the foster parents, have some interest of their own to advance simultaneously. It is my view that there must be independent counsel whose sole commitment is to the children, and who is therefore free to advocate their interests vigorously even though they may conflict with the interests of some other party to this litigation.

The Civil Liberties Union continues to adhere to its position that there is no conflict between the interests of the foster parents and those of the children. (Memorandum of Civil Liberties Union, Page 1.)

In view of the insistence by the Civil Liberties Union in its pleadings and on this motion that the children should be aligned with the foster parents, and its attempt to foreclose the litigation of any dispute between the children and the foster parents, the court believes that the Civil Liberties Union cannot provide effective assistance to the court in defining, articulating and exploring those interests of the children which are potentially adverse to those of the foster parents.

Ms. Lowry of the Civil Liberties Union once more directs our attention to her personal commitment to represent the named children, and, in the event of a conflict, to require the foster *parents* to obtain separate counsel.

I am not disposed to lend much weight to this commitment, for Ms. Lowry has undertaken to represent not only the named children, but an entire class of more than 1,000

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foster children who had no voice in retaining the Civil Liberties Union in the first instance. It is the responsibility of the court to insure that the class is represented by counsel who will consider and advocate the needs and desires of children in a wide variety of circumstances, some of which may differ greatly from those of the three named children.

Furthermore, it is most doubtful that the named children, who are six, nine and eleven years old, can make an informed choice of counsel to represent their own interests. (See Affidavit of Helen L. Bittenwieser, Paragraph 5) I think that I am justified in attaching no weight whatever to the named children's choice as it affects the representation of the other children in the class.

The Civil Liberties Union has chosen a uniquely inopportune time to submit affidavits of foster *parents* averring that the foster children wish Ms. Lowry to continue to represent them. The submission of these affidavits attests the Civil Liberties Union's apparent inability to appreciate, much less to share, this court's concern over a potential conflict of interest between the foster parents and the children.

The Civil Liberties Union correctly states that this court has not found that the Civil Liberties Union has violated the Code of Professional Responsibility.³ However, the Civil Liberties Union argues further that in the absence of such a finding, the court may not provide substitute counsel for the class of children.

I disagree. As stated above, Rules 17(c) and 23(a)(4) provide ample authority for the appointment of separate counsel upon a determination that such appointment is necessary to insure adequate representation of the class of children. See *Doe v. Norton*, 365 F. Supp. 65 (D. Conn.

³ There has been no suggestion that the Civil Liberties Union counsel have not discharged their duties according to the highest standards of our profession.

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1973). The latter determination does not require a finding that the original counsel to the children have violated professional ethics.

The Civil Liberties Union also charges that Ms. Bittenwieser cannot provide independent representation for the children in view of her past representation of child-care agencies which place foster children. I do not, however, believe that the fact that Ms. Bittenwieser previously represented organizations that might have some interest in this litigation is, in itself,⁴ of any consequence.

In addition, on oral argument, the Civil Liberties Union contended that in view of the position taken by Ms. Bittenwieser in her answer filed on November 13, the court's reaffirmation of her appointment on this motion is tantamount to a determination on the merits. It should be noted, however, that when the court first appointed Ms. Bittenwieser in October, it had no inkling whatever of the position she would take on the issues in this case. Thus her selection was in no way influenced by a consideration of the merits.

Furthermore, although Ms. Bittenwieser ultimately did take a position on the issues in the case, the court has every reason to believe that she did so upon consideration of the interests of the children alone, and without regard to the interests of any other party to this litigation.

I disagree with the Civil Liberties Union's contention that a full evidentiary hearing should have been held before the appointment of separate counsel for the children. In each of the cases cited by the Civil Liberties Union, one party sought to disqualify counsel for the opposing party, charging serious violations of professional ethics. *E.g.*, *Laskey Bros. v. Warner Bros. Pictures*, 224 F. 2d 824 (2d Cir. 1954); *Consolidated Theatres v. Management Corp.*,

⁴ There is, of course, no suggestion of any unauthorized use of confidential information obtained in representing a former client.

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216 F. 2d 920, 921-22 (2d Cir. 1954). As noted, the instant case does not involve charges of ethical violations, and the court has acted *on its own motion* on behalf of the children in retaining counsel for them. The court's action is similar to that of a party in retaining counsel on his own behalf, and that is not usually the occasion for an evidentiary hearing. Furthermore, Rule 17(c) does not require such a hearing when the court appoints counsel for an infant. Moreover, since a court may determine the competence of counsel, as required by Rule 23 (a)(4), without an evidentiary hearing, solely on the basis of the pleadings, *Rosenblatt v. Omega Equities Corp.*, 50 F.R.D. 61, 64 (S.D.N.Y. 1970), a court should be able to determine on the basis of the pleadings alone whether a potential conflict may exist and whether counsel for the class may not be willing to press all possible claims of the class.

Finally, it is to be noted that, contrary to the implication of the Civil Liberties Union's memorandum, this court has given the Civil Liberties Union an adequate opportunity to be heard on the issue of counsel, including an informal conference and full oral argument on the instant motion.

The Civil Liberties Union also contends that the court's action in replacing it by independent counsel for the children deprives the children of the right to appear by counsel of their own choice, a right which was extended to minor children by *Application of Gault*, 387 U.S. 1 (1967).

Gault seems to bear only a remote relation to the issues on this motion since it concerns the right of a single 15-year old minor and his parent to have the assistance of counsel in a juvenile delinquency proceeding which was "comparable in seriousness to a felony prosecution." 387 U.S. at 36. Furthermore, this court has obviously not deprived the class of children of counsel altogether. Indeed, in appointing separate counsel, the court has attempted to vindicate the right of the entire class of children to effective, dis-

Appendix "G", Opinion.

interested counsel. As to the named children's right to choose their own counsel, this right is necessarily subject to some limitation where the named parties seek to pursue their interests through a class adjudication which will bind over a thousand other persons who had no part in the original selection of counsel.

*Motion for Appointment of
Guardian Ad Litem*

The Civil Liberties Union moves in the alternative for the appointment of Dr. Kenneth Clark as guardian *ad litem* to the children, pursuant to Rule 17(c). It is proposed that Dr. Clark be permitted to make an independent evaluation of the issues in the case and appoint counsel who, in his judgment, will best protect the interests of the children.

Rule 23 imposes a duty on the *court* to assure that a class is adequately represented by counsel, and Rule 17(c) requires the *court* to make provision for the protection of an infant.⁵ This court has discharged those duties by appointing Ms. Battenwieser as counsel, and it refuses to shift its responsibilities to a guardian *ad litem*.

Thus the motion for the appointment of a guardian *ad litem* is also denied.

So ORDERED.

Dated: New York, New York
December 10, 1974

ROBERT L. CARTER
ROBERT L. CARTER
U.S.D.J.

⁵ Rule 17(c) does not require the appointment of a guardian *ad litem*, but authorizes the court to make any other order which it "deems necessary for the protection" of the foster children.

Appendix "H", Answer.**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS OF THE BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

The children DANIELLE and ERIC GANDY, and RAFAEL SERRANO, and all other children similarly situated, by their attorney HELEN L. BUTTENWIESER, for their answer to the second amended complaint herein:

FOR A FIRST DEFENSE

1. Denies the allegations of paragraphs 5, 9, 10, 11, 59, 60, 61, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76 and 77 of the second amended complaint.

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2. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 6, 7, 8, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57 and 58 of the second amended complaint.

3. Lacks information sufficient to form a belief as to the allegations of paragraph 38 of the second amended complaint except admits that the Catholic Guardian Society of New York is a child-care agency authorized, approved and regulated by the State of New York and supervised by state and city officials.

FOR A SECOND DEFENSE

4. The Court lacks jurisdiction of the subject matter.

FOR A THIRD DEFENSE

5. The second amended complaint fails to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

6. The Plaintiffs have neither legal capacity nor standing to maintain this action, in that the rights sought to be protected are those belonging to the children and not to the Plaintiffs.

FOR A FIFTH DEFENSE

7. Deny that the persons whom the Plaintiffs purport to represent as a class are properly and fairly represented by the Plaintiffs.

8. The interests of the children whom Plaintiffs purport to represent, would be vitally and adversely affected

Appendix "H", Answer.

by the granting of the relief prayed for in the second amended complaint.

FOR A SIXTH DEFENSE

9. Plaintiffs have failed to exhaust their administrative remedies.

WHEREFORE, it is respectfully prayed that judgment be entered dismissing the second amended complaint and granting such other relief as to the Court seems just and proper.

Dated: New York, New York
November 8, 1974

Helen L. Buttenwieser
HELEN L. BUTTENWIESER
Attorney for the children,
Daniell and Eric Gandy and
Rafael Serrano, and all other
children similarly situated
Office and P.O. Address
575 Madison Avenue
New York, New York 10022

APPENDIX

Supreme Court, U. S.
FILED

DEC 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM—1976

Nos. 76-180, 76-183, 76-5193 and 76-5200

J. HENRY SMITH, individually and as administrator of the NEW YORK
HUMAN RESOURCES ADMINISTRATION, *et al.*,

Appellants-Defendants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND
REFORM, etc., *et al.*,

Appellees.

BERNARD SHAPIRO, individually and as Executive Director of the New
York State Board of Social Welfare, *et al.*,

Appellants-Defendants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND
REFORM, etc., *et al.*,

Appellees.

NAOMI RODRIGUEZ, etc., *et al.*,

Appellants-Intervenors,

v.

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND
REFORM, etc., *et al.*,

Appellees.

DANIELLE and ERIC GANDY, etc., *et al.*,

Appellants-Plaintiffs,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN THE

Supreme Court of the United States

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REFORM, etc., *et al.*,

Appellees.

APPENDIX

Relevant Docket Entries

Docket

- 1 5- 9-74 Filed Complaint and issued summons.
- 2 5-13-74 Filed pltf's affdvt. and Order to Show Cause for a THREE-JUDGE-Court and why defendants should not be enjoined. Defendants are temp. restrained from removing Eric and Danielle Gandy from the home of Madeline Smith. Posting of Security is waived.—ret. 5-17-74 at 2 PM in Room 512—Carter, J.
- 3 5-23-74 Filed pltf's. affdt. and notice of motion for an order joining Ralph and Christine Goldbert (sic.) on their own behalf and as next friend for Rafael Serrano as pltf's. in this section (sic.) ret. on: May 31, 1974.
- 5 5-31-74 Filed stip. and order that the T.R.O. issued on 5-9-74 be continued until determination of pltf's motion to convene a three-judge court and if motion is granted until the hearing before such a three-judge court: counsel for deft. Dumpson, Beine & Dall to not appose pltf's' motion to join as plaintiffs Ralph and Christine Goldberg on their own behalf and as next friend of Rafael Serrano—the return of pltf's' motion is adj. to 6-5-74—Carter, J.
- 3 6- 5-74 Filed memo endorsed on pltf's motion to join parties: Motion granted by consent. So ordered—Carter, J. m/n

*Relevant Docket Entries**Docket #*

- 9 6-25-74 Filed affdvt. and notice of motion on behalf of Naomi Rodriguez, Rosa Diaz, Mary Robins and Dorothy Nelson Shabazz to intervene—ret. 7-24-74
- 12 7- 5-74 FILED SECOND AMENDED COMPLAINT
- 14 7- 9-74 Filed order designating in addition to Judge Carter, to hear and determine said cause as provided by law: Edward Lombard, C.J. and Milton Pollack, D.J.—Kaufman, Ch.J., C.A. m/n
- 16 7-15-74 Filed pltf's affdvt. and ORDER TO SHOW CAUSE why an order should not be entered granting pltf. preliminary injunction against defts. Order that pending the hearing and determination of this motion, that Joseph D'Elia be temporarily restrained from removing Cheryl, Patricia, Cynthia, and Cathleen Wallace from the home of Dorothy and George Lhotan, and it is further ordered that posting of security is waived—personal service by 7-8-74 at 12 noon.—ret. 7-18-74 at 10 AM in Room 310—Carter, J.
- 31 8-14-74 Filed pltf's affdvt. and notice of motion for class action.*

* All motions were contested unless otherwise noted.

*Relevant Docket Entries**Docket #*

- 33 8-19-74 Filed order that plaintiffs' motion for the convening of a three-judge court pursuant to 28: 2281 and 2284 is granted; ordered that pltf's motion to join Dorothy and George Lhotan, and Cheryl, Patricia, Cynthia and Cathleen Wallace as parties plaintiff, and Joseph D'Elia, Commissioner of the Nassau County Department of Social Services, Bernard Shapiro, Executive Director of the N.Y. State Board of Social Welfare, and Abe Lavine, Commissioner of the State Department of Social Services as parties defendant is granted; ordered that deft. Joseph D'Elia be restrained from removing Cheryl, et al. from the home of Dorothy and George Lhotan, pending hearing before the three-judge court and a determination of pltf's motion for a preliminary injunction. Further ordered that the motion of Naomi Rodriguez, Rosa Diaz, Mary Robins and Dorothy Nelson Shabazz to intervene as defendants is granted solely for the purpose of litigating the issues contained in pltf's 2nd amended complaint; . . . —Carter, J. m/n
- 36 9-24-74 Filed ANSWER of defendants Bernard Shapiro, indiv. and in his capacity as Executive Director of the N.Y. State Board of Social Welfare and Abe Lavine, indiv. and in his capacity as Commissioner of the N.Y. State Dept. of Social Services.

*Relevant Docket Entries**Docket #*

- 37 10-15-74 Filed plaintiff's affdvt. and notice of motion to declare N.Y. Social Services Law §§ 383(2) and 400 and Title 18, N.Y. Codes Rules and Regulations §450.14 (now re-numbered §450-10) unconstitutional, etc.—ret. 10-29-74 at 4:00 PM.
- 42 10-17-74 Filed Notice of Motion for leave to join as additional party intervenor deft. and to amend Answer.
- 43 10-17-74 Filed Motion of Intervenor Defendants to certify class.
- 46 10-25-74 Filed Defts Lavine and Shapiro's Affdvt. & Notice of Motion for judgment on pleadings.
- 51 11- 8-74 Filed Plntfs Affdvts. and Order to Show Cause for hearing on plntfs Rule 17(c) Motion.
- 59 12-11-74 Filed Opinion 41563 of Carter, J., denying motions to continue N.Y.C.L.U. as counsel to foster children or to appoint Dr. Kenneth Clark as guardian ad litem to children. Court affirms Ms. Battenwieser as independent counsel to children.
- 62 12-31-74 Filed by Attorneys Marcia Robinson Lowry and Peter Bienstock notice of appeal to the USCA for the 2nd Circuit from

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- order of 12-11-74, disqualifying counsel to the plaintiffs herein from further representation of plaintiffs Rafael Serrano, Danielle and Eric Gandy, and Cheryl, Cynthia, Patricia and Cathleen Wallace, copies mailed to Helen L. Battenwieser, Esq., Stanler Kator, Esq., Elliot Hoffman, Esq., Jack Olchin, Esq., Louise Ganz, Esq.
- 64 1- 3-75 Filed by pltfs' Foster Children Danielle and Eric Gandy, Raphael Serrano and all other children similarly situated for an order (a) desolving restraining order (b) terminating the effect of a stip. entered into in lieu of a stay which presently prevents the Catholic Guardian Society and the N.Y. City Department of Social Service from making a determination concerning the named plaintiff children who are their responsibility, etc.—ret. 1-10-75.
- 73 2-28-75 Filed order that the trial of the THREE-JUDGE COURT be held on 3-3-75 at 10 AM—Carter, J. m/n by chambers.
- 74 3- 5-75 Filed true copy of USCA stip. and order that the appeal dated 12-31-74 is hereby withdrawn without prejudice.
- 84 6-25-75 Filed Transcript of record of proceedings, dated March 3, 1975.

*Relevant Docket Entries**Docket #*

- 89 10- 1-75 Filed deposition of deft. by Retta Friedman—dated 4-1-75 m/n.
- 90 10- 3-75 Filed deposition of Dr. Joel Kovel on April 2, 1975.
- 91 10- 3-75 Filed deposition of Eugene A. Weinstein, Ph.D. as a witness on March 18, 1975.
- 92 10- 3-75 Filed deposition of Henry Grunebaum on April 10, 1975.
- 93 10- 3-75 Filed deposition of David Fanshel on April 8, 1975.
- 94 10- 3-75 Filed continued deposition of David Fanshel on May 12, 1975.
- 96 10- 9-75 Filed examination of defts Mary Jane Brennan dated 4-9-75. m/n
- 98 12-22-76 (sic) Fld Deposition of Joseph Goldstein taken on 4-1-75.
- 99 3-22-76 Fld Opinion No. 44102. . . . From U.S. District Court. . . . In summ., therefore, we conclude that N.Y. Social Services Law S S 383(2) and 400, and N.Y.C.R.R. S 450.14, as presently operated, unduly infringe the constitutional rights of foster children. Defts are enjoined from removing any foster children in the certified class from the foster homes in which they have been placed un-

*Relevant Docket Entries**Docket #*

- less and until they grant a pre removal hearing in accord with the principles set forth above. Of course, our decision today does not in any way limit the authority of the State to act summarily in emergency situations. Family Court Act S 1021. . . . So Ordered. . . . Lumbard, C.J. & Carter, J.
mn
- 100 3-22-76 Fld Dissenting Opinion No. 44104. . . . I would dismiss the complt. . . . Pollack, J.
mn Amended 3-25-76
- 101 3-22-76 Fld Opinion No. 44103. . . . In sum, the motions to certify a class of plttf foster parents, plttf foster children, and intervenor-deft. natural parents are granted. Intervenors' motion to amend their complt is granted except for affirmative defenses 14 & 15 and the cross-claim, which are not allowed; and the intervenors' motion to join an add'l pty is granted. So Ordered. . . . Carter, J. mn
- 102 3-29-76 Filed amended Opinion No. 44102 concluding that N.Y.S.S.L. §§ 383(2) and 400 and N.Y.C.R.R. § 450.14 as presently operated, unduly infringe the constitutional rights of foster children and enjoining defts from removing foster children unless and until preremoval hearing is granted.

*Relevant Docket Entries**Docket #*

- 103 4-14-76 Filed Order & Judgment holding N.Y. Soc. Services Law §§ 383(2) and 400, and N.Y.C. R.R. § 450.14 unconstitutional; stay of effective date of Order and Judgment for 30 days to permit application to Justice of Supreme Court of U.S. for further stay pending appeal to the Supreme Court.
- 107 5-25-76 Filed plntfs' Notice of Motion for order substituting new counsel for plntf foster children. w/memo endorsed.
- 110 5-26-76 Filed order from Supreme Court of U.S. that judgment of U.S.D.C. of 4-14-76 be stayed pending referral to and further order of the county.
- 115 6-10-76 Filed L.J. Lefkowitz, Atty. Gen. of State of N.Y., atty. for defts Shapiro & Lavine's Notice of Appeal to the Supreme Court of U.S. from 4-14-76 to Order and Judgment.
- 116 6-17-76 Filed Infant plntf's Notice of Appeal to U.S. Supreme Court, from 4-14-76 U.S.D.C. Order.
- 117 6-10-76 Filed Intervenor Defts' Notice of Appeal to the Supreme Court of U.S. from 4-14-76 U.S.D.C. Order.
- 118 6-9-76 Filed Deft New York City's Notice of Appeal to Supreme Court of U.S. from 4-14-76 U.S.D.C. Order.

*Relevant Docket Entries**Docket #*

- 119 7-16-76 Filed plaintiff's Notice of Appeal to U.S. C.A. from opinion & order ent. 6-29-76 denying plaintiff foster parents' motion to substitute new counsel for foster children.
- 125 9-27-76 Filed true copy of Order from U.S.C.A. granting Intervenor Defts' motion to dismiss appeal from U.S.D.C. and to stay briefing schedule.
- 126 9-27-76 Filed true copy of State Defendant's Order from U.S.C.A.
- 127 10-19-76 Filed true copy of Order from Supreme Court of U.S. re: Consolidation from Appeal.
- 128 10-19-76 Filed true copy of above Order.
- 129 10-19-76 Filed true copy of above Order.
- 130 10-19-76 Filed true copy of above order.
- 131 Stipulation to replace items filed but missing from docket and/or record
- 133 Deposition of Laura Mae Thomas filed September 22, 1975
- 134 Deposition of Seymour Shapiro filed September 22, 1975
- 135 Deposition of Dr. Stella Chess, with exhibit filed September 22, 1975

*Relevant Docket Entries**Docket #*

- 136 Deposition of Sydney Smerzak filed September 22, 1975
- 137 Deposition of Albert Solnit filed September 22, 1975
- 138 Continued Deposition of Albert Solnit filed September 22, 1975
- 139 Deposition of Shirley Jenkins filed October 3, 1975
- 142 Order to Show Cause of March 26, 1976
- 143 Defts Shapiro Notice and Proposed Order and Judgment
- 144 Deft Smith's Proposed Order and Judgment with Affidavit of April 8, 1976 including motion to reargue.
- 146 Intervenor-defts' proposed order and Affidavit of April 5, 1976 including motion to reargue.
- 148 Deposition of Robert Catalano taken April 14, 1975
- 149 Deposition of Peter Mullaney taken April 14, 1975
- 151 Clerk's Certificate

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 RLC

CLASS ACTION

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of New York City SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

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1. This is a class action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 to protect and redress rights guaranteed by the Fourteenth Amendment. In this action, plaintiffs and members of their class seek a declaration that New York Social Services Law §§ 383 (2) and 400 on their face and as applied violate the due process and equal protection clauses of the Fourteenth Amendment and an injunction against their continued application, and a declaration that the procedures for removing children from foster homes as contained in 18 NYCRR 450.14, and as applied by defendants, violate the rights of plaintiffs and members of their class to due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment, and an injunction against the removal of children from the homes of foster parents in violation of the Fourteenth Amendment.

JURISDICTION

2. This being an action to redress the deprivation under color of state law of rights, privileges and immunities guaranteed by the United States Constitution, jurisdiction is conferred on this court by 28 U.S.C. § 1343 (3) and (4).

THREE-JUDGE COURT

3. A three-judge court should be convened in accordance with 28 U.S.C. § 2281 et seq. since plaintiffs seek to enjoin defendants from acting in accordance with New York Social Services Law §§ 383 (2) and 400, statutes of state-wide application, and 18 NYCRR 450.14, a regulation of state-wide application, on the ground that said statutes

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and regulation are unconstitutionally vague on their face and, both on their face and as applied, deny plaintiffs and members of their class due process and equal protection of the law in violation of the Fourteenth Amendment.

CLASS ACTION ALLEGATIONS

4. Plaintiffs bring this action as a class action under Federal Rules of Civil Procedure 23(a), 23(b) (1) (A), 23(b) (1) (B), and 23(b) (2). Defendants have acted on grounds generally applicable to the class, thereby making injunctive and declaratory relief appropriate with respect to the class.

5. There are four sub-classes represented by plaintiffs. All of them involve foster families which have been together for more than one continuous year, and which are in jeopardy of being separated and the children moved elsewhere in violation of their rights to equal protection and due process of law, as guaranteed by the Fourteenth Amendment.

6. Plaintiff Madeline Smith represents the sub-class of foster parents who are under the supervision of authorized child-care agencies. Plaintiffs Ralph and Christiane Goldberg represent the sub-class of foster parents who are under the direct supervision of a public welfare district. Plaintiff Organization of Foster Families for Equality and Reform represents both of these sub-classes, which on information and belief contain well over a thousand members, viz., all those foster parents who have had continuous care and custody of foster children for more than one year, either through an authorized agency or under the direct supervision of a public welfare district.

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7. Plaintiffs Danielle and Eric Gandy, who appear in this action by their foster mother and next friend Madeline Smith, represent the sub-class of foster children under the supervision of authorized child-care agencies, and who have lived in one foster home for more than one year. Plaintiff Rafael Serrano who appears in this action by his foster parents and next friends Ralph and Christiane Goldberg, represents the sub-class of foster children under the direct supervision of a public welfare district. Both of the sub-classes contain, on information and belief, well over a thousand members, viz., all those foster children who have lived in one foster home for more than one year, either under the supervision of an authorized agency or under the direct supervision of a public welfare district.

8. The number of individuals in each of these sub-classes is too numerous to make joinder practicable.

9. Plaintiffs will fairly and adequately represent the interest of the class in the present action. All plaintiffs are represented by attorneys associated with the New York Civil Liberties Union, a privately funded organization, with resources and experience in the area of constitutional litigation.

10. Plaintiffs' claims are typical of the claims of the class. Plaintiffs Madeline Smith, Ralph and Christiane Goldberg, and O.F.F.E.R. represent all those foster parents who have taken homeless, dependent children who are in the custody of public welfare officials, either directly or through authorized agencies, into their homes, who have brought up these children for years, and who are in jeopardy of having these children summarily removed pursuant to statutes and a state regulation, New

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York Social Services Law §§ 383 (2) and 400, and 18 NYCRR 450.14, which violate their constitutional rights to due process and equal protection of the law. Plaintiffs Eric and Danielle Gandy and Rafael Serrano represent all those dependent New York children who are the legal responsibility of public welfare officials, either directly or through authorized agencies, who have been placed in stable, loving foster homes, and who are in jeopardy of losing what has become their family through the arbitrary, standardless procedures authorized by New York Social Services Law §§ 383 (2) and 400, and 18 NYCRR 450.14, in violation of their constitutional rights to due process and equal protection of the law.

11. There are questions of law and fact common to all members of class in this action, in that defendants Dumpson, Beine, Dall and O'Neill have the statutory authority to and do remove foster children from the homes of foster parents in violation of both of these groups' rights to due process and equal protection of the law as guaranteed by the Fourteenth Amendment.

12. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and an adjudication with regard to plaintiffs' constitutional claims would as a practical matter be dispositive with regard to other members of the class. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in the management of a class action.

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PLAINTIFFS

13. The Organization of Foster Families for Equality and Reform is a downstate New York organization of foster parents with a membership of approximately 250 persons. It is a member of the New York state-wide coalition of parent organizations which includes over 2,000 persons. O.F.F.E.R. was organized to provide forums for foster parents to discuss common problems with respect to their relationship with the public officials and child-care agency representatives under whose authorization they receive foster children, and to gather and present information with regard to foster parents' rights.

14. Plaintiff Madeline Smith is a 53-year-old widow who lives in East Elmhurst, New York. She became an approved foster parent under the supervision of Catholic Guardian Society of New York in 1969. On February 1, 1970, she took Eric and Danielle Gandy into her home as foster children, where they have lived and been cared for continually for the past four years.

15. Plaintiffs Eric Gandy, who is eight years old, and Danielle Gandy, who is six years old, appear in this action by their foster mother and next friend, Madeline Smith. Both Danielle and Eric were placed in the custody of the Commissioner of Social Services on April 26, 1968. They were placed in Mrs. Smith's home on February 1, 1970, by Catholic Guardian Society of New York, and have not seen their natural mother at least since that date. Both Danielle and Eric call Mrs. Smith "Mommy."

16. Plaintiffs Ralph and Christiane Goldberg own their own home in Brooklyn. Mr. Goldberg is a hospital ad-

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ministrator. As authorized foster parents directly under the supervision of the Bureau of Child Welfare, they took Rafael Serrano into their home on July 11, 1969, where he has lived as a member of their family for the past five years.

17. Plaintiff Rafael Serrano, who is 11 years old, appears in this action by his foster parents and next friends, Ralph and Christiane Goldberg. On information and belief, he has been in the custody of the Commissioner of Social Services since 1968, when his parents signed a voluntary consent for placement after an abuse report had been filed against him. He has lived with Mr. and Mrs. Goldberg longer than he has lived any place else in his life.

18. Defendant James Dumpson is the duly appointed Administrator of the Human Resources Administration of the City of New York and as such is responsible for the administration of the New York City welfare district. New York Social Services Law § 395 et seq. specifically mandates that the official in charge of the local public welfare district is responsible for all children within his district who are in need of care and assistance.

19. Defendant Elizabeth Beine is an agent of defendant Dumpson and was at the time this action was filed Acting Assistant Administrator of Special Services for Children, an agency within the New York City Human Resources Administration responsible for providing services for all children in need of care in New York. She is also Director of the Bureau of Child Welfare, a division within Special Services for Children.

20. Defendant Adolin Dall is an agent of defendants Dumpson and Beine and is Director of the Division of

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Inter-Agency Relationships of the Bureau of Child Welfare which, upon information and belief, is directly responsible for the supervision of all authorized child-care agencies which serve New York City children.

21. Defendant James P. O'Neill is Executive Director of Catholic Guardian Society of New York, a child-care agency authorized by the New York State Board of Social Welfare to provide services for children and to receive children for placement from the public welfare district administrator. Upon information and belief, Catholic Guardian Society of New York receives over 90 percent of its funding from the City of New York, is subject to state and city regulations and supervision, and acts under color of state law.

STATEMENT OF CLAIM

Mrs. Smith and Eric and Danielle Gandy

22. Upon information and belief, in 1969, plaintiff Madeline Smith became approved as a foster parent by the Catholic Guardian Society of New York, a child-care agency operated by defendant O'Neill under the supervision of defendant Dumpson and his agents.

23. At that time, upon information and belief, Mrs. Smith told the Catholic Guardian Society social worker, Mrs. Armstrong, that she wanted foster children who had no family at all, because she would like to adopt them. Mrs. Smith told Mrs. Armstrong that she had arthritis, which made her unable to work, but she said, upon information and belief, that she was capable of caring for children and was anxious to do so because her own daughter had died.

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24. Upon information and belief, Mrs. Armstrong told Mrs. Smith that Catholic Guardian Society had two children they would like to place with her, Eric and Danielle Gandy. Upon information and belief, Mrs. Armstrong told her that only Danielle was adoptable because Eric was retarded, but that the agency was anxious to keep the children together because they were the only family each of them had. Mrs. Smith said she would take both children.

25. On February 1, 1970, Eric and Danielle Gandy went to live with Mrs. Smith, where they have lived ever since.

26. Upon information and belief, Eric and Danielle Gandy are legally free for adoption. Upon information and belief, Danielle has never seen her natural mother, Eric does not remember her, and both of them regard Mrs. Smith as their mother.

27. Upon information and belief, Mrs. Smith has repeatedly made known her desire to adopt the children to workers at the Catholic Guardian Society.

28. Upon information and belief, defendant O'Neill and his agents have arbitrarily decided to remove Eric and Danielle Gandy from Mrs. Smith's home. On information and belief, defendants Dumpson, Beine, Dall and their agents have approved defendant O'Neill's decision to remove Eric and Danielle Gandy from Mrs. Smith's home.

29. Upon information and belief, Mrs. Smith has been notified of this decision, but has not received any notice of the reasons upon which the decision has been based. Nor has Mrs. Smith been given an opportunity to challenge these reasons in a hearing.

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30. Upon information and belief, Mrs. Dillon, an employee of Catholic Guardian Society and an agent of defendant O'Neill's, brought Mrs. Smith a letter dated March 29, 1974, a copy of which is annexed hereto as Exhibit A, notifying her that Eric and Danielle would be removed from her home on April 24, 1974. The only reason for the pending removal stated in the letter is: "To continue to plan for Eric and Danielle, it is now in their best interests to leave your home on or about April 24."

31. Upon information and belief, the letter given to Mrs. Smith is a printed form letter routinely used by defendant O'Neill as the only notice to foster parents of the pending removal of foster children from their foster homes. The only blanks to be filled in on the form are the names of the foster parents and the children, the date of the letter and the date on which the children are to be removed. The statement quoted in paragraph 30 is part of the printed form, with the exception of blanks for the children's names and the removal date.

32. Upon information and belief, the only opportunity for a hearing that has been afforded to Mrs. Smith was contained in the following statement in the form letter: "In the event that you wish to waive the ten days' notice usually given to a foster parent before removing a child just check this box, sign below, and return this letter to me. However, if you have have serious questions about this plan, it is your right to request a conference with a public official. The Public Official will review with you the reasons for the decision; and you can give your reasons for requesting the conference."

33. Upon information and belief, the conference referred to in the letter does not satisfy the most minimal

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due process rights, in that there are no written standards or guidelines concerning the conference itself, there are no written standards or guidelines by which to judge the appropriateness of the agency's removal decision, the foster parent is not entitled to a written statement specifying the basis for the agency's decision, the foster parent is not entitled to confront and question those persons supplying the facts, if any, upon which the agency decision has been made, and the foster parent is not entitled to bring her own witnesses.

34. Upon information and belief, Mrs. Dillon brought Mrs. Smith the letter told her to check a box and sign the letter, and told her that she had not waived any rights to a review of the agency's decision to remove the children. Upon information and belief, Mrs. Smith was denied even this legally insufficient conference since her alleged waiver of the conference was an uninformed waiver.

35. Upon information and belief, defendants O'Neill and his agents, and defendants Dumpson, Beine, and Dall have decided to and plan to remove Eric and Danielle Gandy permanently from Mrs. Smith's home on May 10, 1974.

36. Upon information and belief, the procedure followed by defendant O'Neill and his agents, with regard to notification to Mrs. Smith of the planned removal of her foster children is regularly followed by defendant O'Neill's agents with regard to other foster parents and children over whom they have control.

37. Upon information and belief, this procedure is followed and carried out with the full knowledge and cooperation of and acting in concert with and under the au-

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thority of defendants Dumpson, Beine, and Dall and their agents.

38. All actions of defendant O'Neill and his agents alleged in this complaint are and have been carried out under color of state law. Catholic Guardian Society of New York, of which defendant O'Neill is Executive Director, is a child-care agency authorized, approved and regulated by New York state law, and supervised by state and city public officials. Upon information and belief, it receives over 90 percent of its funding from the City of New York, and the acts as an agent of the city with regard to those children including Eric and Danielle Gandy, whom the city has referred to Catholic Guardian Society for placement. Upon information and belief, a substantial portion of the money Catholic Guardian Society receives from the City of New York is reimbursed to the city from the federal government as Aid to Families of Dependent Children payments under Title IV-A of the Social Security Act.

39. Upon information and belief, this procedure, or procedures substantially similar, are followed and carried out by other child-care agencies under the control and supervision of defendants Dumpson, Beine, and Dall and their agents with the full knowledge and cooperation of said defendants.

40. Upon information and belief, notification of the availability of an administrative conference, held pursuant to 18 NYCRR 450.14, is frequently carried out by defendant O'Neill and waivers obtained, without said waivers being informed waivers, and without the notified foster parents being fully informed of and aware of their rights.

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41. Upon information and belief, notification of the availability of an administrative conference held pursuant to 18 NYCRR 450.14 is made in a substantially similar way by other child-care agencies under the control and supervision of defendants Dumpson, Beine, and Dall and their agents, and with their full knowledge and cooperation.

Mr. and Mrs. Goldberg and Rafael Serrano

42. Mr. and Mrs. Goldberg are authorized foster parents under the direct supervision of defendants Dumpson and Beine. They took Rafael Serrano into their home on July 11, 1969, when he was six years old.

43. On information and belief, Rafael had lived in several other homes before he came to live with Mr. and Mrs. Goldberg in 1969, and had been severely abused by his parents during the time he lived with them.

44. Upon information and belief, when Rafael was placed with Mr. and Mrs. Goldberg by the Bureau of Child Welfare in 1969, the worker told them that he was brain damaged, retarded and hyperactive. Upon information and belief, they were told that if they didn't take the six-year-old boy at that time, the Bureau of Child Welfare would place him in a state hospital.

45. Upon information and belief, when Rafael first came to live with Mr. and Mrs. Goldberg, he was a very disturbed, unhappy child who threatened to tear apart their home and their own three-year-old daughter. A doctor who saw Rafael at that time described him as being paralyzed by anxiety.

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46. Upon information and belief, the Bureau of Child Welfare worker told Mr. and Mrs. Goldberg shortly after they took Rafael that they should not feel bad about returning him to the agency since his record showed an inability to adjust to a family setting. Upon information and belief, the agency worker said the alternative to the Goldbergs' home for Rafael would be an institution.

47. Rafael has lived with Mr. and Mrs. Goldberg and their daughter for the last five years as a member of their family. He is now doing well in school, and has made friends in their community.

48. Mr. and Mrs. Goldberg have been commended repeatedly by employees and agents of defendants Dumpson and Beine for doing an admirable job in raising Rafael.

49. Rafael's parents have not seen the boy in well over a year and, upon information and belief, have made no attempts to have their son returned to them. Upon information and belief, all of their six children are in foster care and the Bureau of Child Welfare has recommended adoption for two of them.

50. Upon information and belief, the Bureau of Child Welfare worker in charge of Rafael's case, Robert Tobing, has recommended that Rafael be taken from his home with Mr. and Mrs. Goldberg within the next few months and given to an aunt whom Rafael has visited only once.

51. Upon information and belief, the aunt to whom the agency plans to give Rafael does not want to take him from the Goldbergs' home and does not want to bring him up.

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52. Upon information and belief, Mr. and Mrs. Goldberg have not been notified directly of the Bureau of Child Welfare's decision to remove Rafael from their home, nor do they know any reason why such an action should be taken.

53. Upon information and belief, the Bureau of Child Welfare is working toward removing Rafael from his home with Mr. and Mrs. Goldberg, by attempting to set up visits between Rafael and his aunt so they can get to know each other before Rafael is to be moved. Such visits in the context of a planned move are subjecting Rafael and Mr. and Mrs. Goldberg to severe anxiety and uncertainty.

54. Upon information and belief, these actions of defendants Dumpson, Beine and their agents, to begin to effectuate a plan to remove a child from a home he has made with his foster parents, without adequate notice of the planned removal and without stating the reasons for such a removal, are carried out in a substantially similar way with regard to other foster parents and children under the direct supervision and control of the Bureau of Child Welfare, and with the full knowledge and cooperation of defendants Dumpson and Beine.

55. Under 18 NYCRR 450.14, Mr. and Mrs. Goldberg are only entitled to notification that Rafael is to be removed from their home 10 days prior to the date of the actual removal.

56. When they are thus notified, they have a right to request a conference with an agent and employee of the Bureau of Child Welfare, prior to the removal, pursuant to 18 NYCRR 450.14.

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57. Upon information and belief, the costs of the foster care program under the direct supervision of the Bureau of Child Welfare, in which Mr. and Mrs. Goldberg are authorized foster parents, are substantially reimbursed by the federal government as Aid to Families of Dependent Children payments under Title IV-A of the Social Security Act.

New York City Revised Procedure

58. Subsequent to the filing of this action, defendant Dumpson and his agents promulgated a document entitled "Human Resources Administration Inter-Office Memorandum, Subject: Administrative Removal of Foster Children," dated June 25, 1974, setting forth procedural changes with regard to the removal of New York City foster children from foster homes under certain circumstances.

CAUSES OF ACTION

59. The notification procedure described above in paragraphs 29 through 41 violates the right of plaintiff Smith and foster parents who are members of her class not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

60. The notification procedure contained within the New York City procedure referred to in paragraph 58 above violates the rights of plaintiffs Smith and Ralph and

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Christiane Goldberg and members of their class not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

61. The plan and the attempts by agents of defendants Dumpson and Beine to begin implementation of their decision to remove Rafael Serrano from his home with Mr. and Mrs. Goldberg, prior to notification that the child is to be removed, violates the right of plaintiffs Ralph and Christiane Goldberg not to be deprived without due process of law of the fundamental right to establish a home and bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the Fourteenth Amendment.

62. New York Social Services Law § 383 (2), which authorizes defendant O'Neill and his agents, with the knowledge, authorization and encouragement of defendants Dumpson, Beine and Dall, to remove Eric and Danielle Gandy from Mrs. Smith's home and which authorizes defendants Dumpson and his agents to remove Rafael Serrano from Ralph and Christiane Goldberg's home provides:

"The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in

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its discretion remove such child from the home where placed or boarded."

63. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Smith and Ralph and Christiane Goldberg and foster parent members of their class not to be deprived of their fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

64. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Eric and Danielle Gandy and Rafael Serrano and other foster children in their class to those fundamental rights and privileges long recognized as assential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

65. The statute, New York Social Services Law § 400, which authorized defendants Dumpson and Beine and their agents to remove Rafael Serrano from the home of Ralph and Christiane Goldberg, provides:

"When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

"Any person aggrieved by such decision of the commissioner of public welfare of city welfare of-

Second Amended Complaint

ficer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof."

66. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiffs Ralph and Christiane Goldberg and foster parent members of their class not to be deprived of their fundamental rights to establish a home, bring up children and to enjoy those privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due process guarantee of the Fourteenth Amendment.

67. Said statute is unconstitutionally vague and fails to set standards in violation of the rights of plaintiff Rafael Serrano and members of his class to those fundamental rights and privileges long recognized as essential to the pursuit of happiness and liberty encompassed within the due proceses guarantee of the Fourteenth Amendment.

68. The facial constitutional infirmity of New York Social Services Law §§ 383(a) and 400 is further compounded by the absence of any state regulations which set standards by which these statutes are to be applied,

Second Amended Complaint

in violation of the due process rights of plaintiffs and members of their class.

69. The facial constitutional infirmity of Social Services Law § 383 (2) is further compounded by the fact that this unfettered discretion, which is exercised in the absence of any state regulations setting standards, is given to employees and agents of voluntary child-care agencies, who act under color of state law but are not under the control of public officials, in violation of the right of plaintiffs Madeline Smith and Eric and Danielle Gandy and members of their class to due process and equal protection of the law.

70. New York Social Services Law § 400, which provides a foster parent aggrieved by a decision to remove a foster child from his or her home with the right to a fair hearing subsequent to the removal of the child, extends only to foster parents under the direct supervision of a public welfare official. On its face, this statute deprives plaintiffs Madeline Smith and Eric and Danielle Gandy and members of their class, who are foster parents and foster children under the direct supervision of a voluntary child-care agency, of equal protection of the law in violation of their constitutional rights.

71. On its face, 18 NYCRR 450.14(a) (b) and (c) insofar as it provides an administrative conference without mandating even minimal due process safeguards and standards prior to the removal of foster children from foster homes, violates the constitutional rights of plaintiffs Madeline Smith and Eric and Danielle Gandy, and Ralph and Christiane Goldberg, and members of their

Second Amended Complaint

class not to be deprived of liberty or fundamental rights without due process of law.

72. As applied by defendants, 18 NYCRR 450.14 (a) (b) and (c) insofar as it provides an administrative conference prior to the removal of foster children from foster homes without constitutionally adequate due process safeguards, violates the constitutional rights of plaintiffs and members of their class not to be deprived of liberty or fundamental rights without due process of law.

73. The internal procedure enacted by defendants Dumpson and his agents, dated June 25, 1974, and referred to in paragraph 58 above, is unconstitutionally vague, fails to set standards, and does not provide constitutionally adequate due process safeguards prior to the removal of foster children from foster homes, in violation of the rights of plaintiffs and members of their class not to be deprived of liberty or fundamental rights without due process of law.

74. New York Social Services Law § 400 and 18 NYCRR 450.14(c) provide that a foster family aggrieved by a decision to remove a child from its home may request a fair hearing to review the decision subsequent to the time the child is actually removed from the home.

75. The absence of a fair hearing prior to the termination of participation in a program funded by the federal government, under its Aid to Families of Dependent Children, while other recipients and beneficiaries of federal funds under Aid to Families of Dependent Children are entitled to a fair hearing prior to such a termination, under 18 NYCRR 358.8, violates the rights of plaintiff

Second Amended Complaint

foster families and foster children to equal protection of the law as guaranteed by the Fourteenth Amendment.

76. The absence of any hearing procedure which satisfies due process standards prior to the removal of foster children from homes in which they have lived for more than a year violates the rights of Eric and Danielle Gandy and Rafael Serrano and members of their class not to be subjected to irreparable harm and denied liberty and fundamental rights without due process of law as guaranteed by the Fourteenth Amendment.

77. The absence of any hearing procedure which satisfies due process standards prior to the removal of foster children from homes in which they have lived for more than a year violates the rights of Madeline Smith and Ralph and Christiane Goldberg and members of their class not to be subjected to irreparable harm and denied liberty and fundamental rights without due process of law as guaranteed by the Fourteenth Amendment.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

(a) Grant a temporary restraining order restraining defendants O'Neill, Dumpson, Beine and Dall from removing Eric and Danielle Gandy from the home of Mrs. Madeline Smith;

(b) Convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284;

Second Amended Complaint

(c) Enter a declaratory judgment that New York Social Services Law § 383(2) is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(d) Enter a declaratory judgment that New York Social Services Law § 400 is unconstitutional on its face and as applied as a violation of the due process and equal protection clauses of the Fourteenth Amendment;

(e) Enter a declaratory judgment that the practice of defendants Dumpson and Beine and their agents of failing to provide a due process hearing prior to the removal of children from foster homes in which they have lived continuously for over one year violates the rights of foster parents and children to due process and equal protection of the law;

(f) Enter a declaratory judgment that 18 NYCRR 450.14 is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(g) Enter a declaratory judgment that the New York City Human Resources Administration internal procedure for removing foster children from foster homes is unconstitutional on its face and as applied as a violation of the due process clause of the Fourteenth Amendment;

(h) Preliminarily and permanently enjoining defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year pursuant to New York Social Services Law § 383 (2);

Second Amended Complaint

(i) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year pursuant to 18 NYCRR 450.14;

(j) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year pursuant to the New York City Human Resources Administration internal procedure;

(k) Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year without the due process safeguards of adequate and specific notice and a prior hearing which satisfy the due process requirements of the Fourteenth Amendment;

(l) Such other and further relief as this Court deems just and proper.

Respectfully submitted,

MARCIA ROBINSON LOWRY
Children's Rights Project
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Plaintiffs

Exhibit A

CATHOLIC GUARDIAN SOCIETY
1011 FIRST AVENUE
NEW YORK, NEW YORK 10022

Telephone: 371-1000

September 21, 1973

Telephone # 478-0945

Date: 3/29/74

Re: Eric & Danielle Gandy

Mrs. Madeline Smith
23-15 101st Street
East Elmhurst, N.Y.

Dear Mrs. Smith

The care and attention you have given to the foster child(ren) in your home is greatly appreciated. This has been a service not only to the child, but to your community.

To continue to plan for Eric & Danielle, it is now in (their) best interests to leave your home on or about April 24. Should you desire any additional information, please feel free to contact me.

In the event that you wish to waive the ten day's notice usually given to a foster parent before removing a child just check this box [☒, sign below, and return this letter to me.

However, if you have serious questions about this plan, it is your right to request a conference with a public offi-

Exhibit A

cial. The Public Official will review with you the reasons for the decision; and you can give your reasons for requesting the conference. If you wish, you can bring a representative to the conference. Please let me know immediately if you wish me to arrange such a conference for you and whether you plan to bring a representative. Otherwise, I shall assume you are in agreement that the plan should be carried out.

Once again, may we thank you for your service to the New York City's children.

Sincerely yours,

JANE-ELLEN DILLON
Caseworker

(ILLEGIBLE)

(ILLEGIBLE)

MADELINE SMITH

Order Convening Three Judge Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND
REFORM, *et al.*,

Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,

Defendants.

This cause having come on to be heard on plaintiffs' motion pursuant to 28 U.S.C. §§ 2281 and 2284 for the convening of a three-judge court, plaintiffs' motion to join parties pursuant to Fed. R. Civ. P. 21, plaintiffs' motion for a temporary restraining order pursuant to 28 U.S.C. § 2284(3), and the motion of Naomi Rodriguez et al. to intervene in this action pursuant to Fed. R. Civ. P. 24(a) and (b), and papers having been submitted and a hearing having been held on all the motions listed above on August 5, 1974, before the Hon. Robert L. Carter, it is

ORDERED that plaintiffs' motion for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 be and hereby is granted, and it is further

Order Convening Three Judge Court

ORDERED that plaintiffs' motion to join Dorothy and George Lhotan, and Cheryl, Patricia, Cynthia and Cathleen Wallace as parties plaintiff, and Joseph D'Elia Commissioner of the Nassau County Department of Social Services, Bernard Shapiro, Executive Director of the New York State Board of Social Welfare, and Abe Lavine, Commissioner of the New York State Department of Social Services as parties defendant be and hereby is granted, and further

The court having made a finding that irreparable injury will result to Cheryl, Patricia, Cynthia and Cathleen Wallace through the disruption in their lives caused by their removal from the home of Dorothy and George Lhotan, and in order to maintain the status quo with regard to these children and their foster parents, it is further

ORDERED that defendant Joseph D'Elia be restrained pursuant to 28 U.S.C. § 2284(3) from removing Cheryl, Patricia, Cynthia and Cathleen Wallace from the home of Dorothy and George Lhotan or in any way interfering with or interrupting their stay with these foster parents pending a hearing before the three-judge court, and a determination of plaintiffs' motion for a preliminary injunction and it is further

ORDERED that the motion of Naomi Rodriguez, Rosa Diaz, Mary Robins and Dorothy Nelson Shabazz to intervene as defendants in this action pursuant to Fed. R. Civ. P. 24(a) and (b) is granted solely for the purposes of litigating the issues and causes of action contained in Plaintiffs' Second Amended Complaint, and it is further

ORDERED that the cross claims of Naomi Rodriguez, Rosa Diaz, Mary Robins, and Dorothy Nelson Shabazz asserted

Order Convening Three Judge Court

in Intervenor Defendants' Answer and Cross Claim are stricken and the intervenor defendants' cross claims are disallowed.

Dated: New York, New York
August 15, 1974

ROBERT L. CARTER
United States District Judge
A True Copy

RAYMOND F. BURGHARDT,
Clerk

By: G. HARBISON
Deputy Clerk

Answer of New York State Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants.

Defendants Bernard Shapiro, individually and in his capacity as Executive Director of the New York State

Answer of New York State Defendants

Board of Social Welfare and Abe Lavine, individually and in his capacity as Commissioner of the New York State Department of Social Services, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for their answer to the second amended complaint herein, on information and belief, respectfully:

First: Deny each and every allegation contained in paragraphs 2, 4, 5, 59, 60, 61, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76 and 77 of plaintiffs' second amended complaint.

Second: Admits each and every allegation contained in paragraphs 3, 18, 19, 20, 21, 31, 55, 56, 57, 58, 65 and 74 of plaintiffs' second amended complaint.

Third: Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 1, 6, 8, 9, 10, 11, 12, 13, 14, 16, 22, 23, 24, 25, 26, 27, 28, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 57 of plaintiffs' second amended complaint.

Fourth: Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 7 of plaintiffs' second amended complaint, except denies so much of the allegations in said complaint as alleges or implies that Danielle and Eric Gandy, may be permitted to or properly appear by and be represented by their "foster mother and next friend Madeline Smith, and further deny so much of the allegations in said paragraph as alleges or implies that plaintiff Rafael Serrano may be permitted to or properly appears by his foster parents and next friends Ralph and Christiane Goldberg."

Answer of New York State Defendants

Fifth: Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 15 of plaintiffs' second amended complaint, except deny so much of the allegations in said paragraph as alleges or implies that plaintiffs Eric and Danielle Gandy may properly appear or be permitted to appear in this action by their foster mother and next friend, Madeline Smith.

Sixth: Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 17 of plaintiffs' second amended complaint, except deny so much of the allegations contained in said paragraph as alleges or implies that plaintiff Rafael Serrano may properly appear or be permitted to appear in this action by their foster parents and next friends Ralph and Christiane Goldberg.

Seventh: Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 29 of plaintiffs' second amended complaint, except denies so much of the allegations in said paragraph as alleges that plaintiff Smith has been denied an opportunity to challenge the basis for the decision:

Eighth: Admit each and every allegation contained in paragraph 30 of plaintiffs' second amended complaint, except deny knowledge or information sufficient to form a belief as to the truth of so much of the allegations in said paragraph as alleges that letter dated March 29, 1974 was delivered by a Mrs. Dillon and that Mrs. Dillon is an employee of the Catholic Guardian Society and an agent of defendant O'Neill, and each such allegation.

Answer of New York State Defendants

Ninth: Denies so much of paragraph 32 of plaintiffs' second amended complaint as alleges or implies that the only mode of review and hearing is contained in the form paragraph of the conference with the public official, but admits that the form letter received by Mrs. Smith does contain the statement quoted in said paragraph.

Tenth: Deny so much of the allegations in paragraph 33 of plaintiffs' second amended complaint as alleges or implies that plaintiff has a right to due process prior to the removal of the foster child, that due process in any event mandates the use of a written statement specifying the basis for the agency's decision, or the right to confront and cross-examine witnesses or the right to present her own witnesses, or the use of written guidelines. Further deny so much of the allegations in said paragraph as alleges that there are no written standards or guidelines concerning the conference itself.

Eleventh: Deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 38 of plaintiffs' second amended complaint, except deny that defendant O'Neill and his agent are acting under color of state law.

AS AND FOR A FIRST SEPARATE AND COMPLETE
AFFIRMATIVE DEFENSE:

Twelfth: Under state law, children placed with agencies for placement in foster care families, remain in the custody of the agency so placing them, and are merely placed into these homes and with the parents as, in effect employees of the agency, as caretakers.

Answer of New York State Defendants

Thirteenth: At no time prior to the completion of adoption proceedings do the children so placed become permanent members of the foster family. At all times prior to the completion of adoption proceedings, if any, the placement agency is responsible for the health, safety and well-being of the children, and continues to maintain supervision over the foster families and custody of the children.

Fourteenth: At no time prior to the onset of formal adoption proceedings is it contemplated that the foster parent relationship is anything more than a temporary caretaker relationship.

AS AND FOR A SECOND SEPARATE AND COMPLETE
AFFIRMATIVE DEFENSE:

Fifteenth: Upon information and belief, in none of the situations involving any of the named plaintiffs does the removal of the children from the homes of the foster parents reflect adversely upon the quality of the care provided by the foster parents or foreclose them from, in the future, again being foster parents.

Sixteenth: Upon information and belief, the foster parents are in no way deprived of either the liberty to engage in familiar relationships or is there any information of the freedom to raise their children in a manner they deem fit.

Seventeenth: There is therefore, on behalf of the foster parents no deprivation of either liberty or property and therefore no violation of their constitutional rights.

Answer of New York State Defendants

AS AND FOR A THIRD SEPARATE AND COMPLETE
AFFIRMATIVE DEFENSE:

Eighteenth: Neither by way of statute or court rule do plaintiff foster parents have any standing to assert the claims, if any of the foster children, as they are neither the parents or legal guardians of the children. Moreover, such representation in an action of this kind is particularly inappropriate as the parents are interested parties who may have an interest adverse to those of the foster children.

AS AND FOR A FOURTH SEPARATE AND COMPLETE
AFFIRMATIVE DEFENSE:

Nineteenth: The complaint fails to state a claim for which relief can be granted.

AS AND FOR A FIFTH SEPARATE AND COMPLETE
AFFIRMATIVE DEFENSE:

Twentieth: The court lacks subject-matter jurisdiction.

WHEREFORE: Defendants Shapiro and Lavine, respectfully pray this Court enter a judgment:

(a) Denying each and every prayer for relief in plaintiffs' second amended complaint and either

(b) Dismissing the complaint; or

(c) In the alternative, entering a declaratory judgment declaring New York Social Services Law § 383(2) constitutional both on its face and as applied; and

Answer of New York State Defendants

(d) Enter a declaratory judgment declaring New York Social Services Law § 400 constitutional both on its face and as applied; and

(e) Granting such other, further and different relief that as to this Court appears just and proper.

Respectfully submitted,

LOUIS J. LEFKOWITZ

Attorney General of the
State of New York

Attorney for defendants Shapiro
and Lavine

By: STANLEY L. KANTOR

Assistant Attorney General

Office & P.O. Office Address

Two World Trade Center

New York, New York 10047

Tel. No. (212) 488-5168

**Intervenor Defendants First Amended Answer
and Cross Claim**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM: MADELINE SMITH, on her own behalf and as next friend of DANIELLE and ERIC GANDY; and RALPH and CHRISTIANE GOLDBERG, on their own behalf and as next friend of RAFAEL SERRANO, on behalf of themselves and all others similarly situated,

Plaintiffs,

—against—

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as director of the DIVISION OF INTERAGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK,

Defendants,

*Intervenor Defendants First Amended Answer
and Cross Claim*

NAOMI RODRIGUEZ, ROSA DIAZ, MARY ROBINS, DOROTHY
NELSON SHABAZZ, on behalf of themselves and all other
persons similarly situated,

Intervenor Defendants
and Cross Claimants.

Intervenor-defendants, by their attorney Marttie Louis
Thompson (Toby Golick, Ira S. Bezoza, Louise Gans of
Counsel), answering the Second Amended Complaint
herein, on their own behalf and on behalf of all other
persons similarly situated, allege:

1. Deny the allegations in paragraphs 10, 11, 12, 33, 59,
60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76 and 77.
2. Deny the allegations in paragraph 9 of Second
Amended Complaint except admit plaintiffs are repre-
sented by attorneys from the New York Civil Liberties
Union with resources and experience in constitutional liti-
gation.
3. Lack knowledge or information sufficient to form a
belief as to Paragraphs 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 22,
23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39,
40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55,
56, 57 and 74.

*Intervenor Defendants First Amended Answer
and Cross Claim*

AS A FIRST AFFIRMATIVE DEFENSE

4. The complaint fails to state a claim against defend-
ants and intervenor-defendants upon which relief can be
granted.

AS A SECOND AFFIRMATIVE DEFENSE

5. Plaintiff foster parents and the class they purport to
represent have no constitutional right to raise and care
for foster children who have been boarded with plaintiff
foster parents by State, City and County Social Service
officials or other authorized agencies pursuant to contract
and license.

AS A THIRD AFFIRMATIVE DEFENSE

6. Under State law, foster parents must be licensed by
the local commissioner of social services before children
may be boarded in their homes; such licenses are of one
year's duration but may be renewed.

7. On information and belief plaintiff foster parents
and the class they purport to represent board children
pursuant to such foster care license.

8. On information and belief said license does not give
to plaintiff foster parents, or to members of their pur-
ported class, the right to board any specific children.

9. On information and belief the licenses of plaintiff
foster parents to board children have not been revoked.

*Intervenor Defendants First Amended Answer
and Cross Claim*

AS A FOURTH AFFIRMATIVE DEFENSE

10. On information and belief State, City and County social service officials placing out or boarding out children customarily enter into a contract with each foster parent with whom a child is boarded.

11. On information and belief standard provision of this contract is that the foster parent agrees to return any child boarded with him or her to authorized agency upon such agency's request.

12. On information and belief plaintiffs, Ralph and Christiane Goldberg, signed a contract containing such a provision with the Department of Social Services of the City of New York in connection with the boarding of the child Rafael Serrano in their home. On information and belief plaintiffs, Dorothy and George Lhotan signed a contract containing such a provision with the Children's Bureau of the Nassau County Department of Social Services.

13. Plaintiff foster parents Ralph and Christiane Goldberg, have accepted the power of the authorized agency to remove children from their home as a condition of their ability to board foster children. Plaintiff foster parents Dorothy and George Lhotan have accepted the power of the authorized agency to remove children from their home as a condition of their ability to board foster children.

AS A FIFTH AFFIRMATIVE DEFENSE

14. On information and belief a voluntary authorized agency placing out or boarding out children enters into a

*Intervenor Defendants First Amended Answer
and Cross Claim*

contract with each foster parent with whom a child is boarded.

15. On information and belief a standard provision of this contract is that the foster parents agree to return any children boarded with them to the authorized agency upon such agency's request.

16. On information and belief plaintiff, Madeline Smith, signed a contract containing such a provision with the Catholic Guardian Society of New York in connection with the boarding of the children, Danielle and Eric Gandy, in her home.

17. Plaintiff foster parent, Madeline Smith, has accepted the power of the authorized agency to remove children from her home as a condition of her ability to board foster children.

AS A SIXTH AFFIRMATIVE DEFENSE

18. Neither by way of statute or court rule do plaintiff foster parents have any standing to assert the claims, if any, of the foster children, as they are neither the parents nor legal guardians of the children. Moreover, such representation in action of this kind is particularly inappropriate as the parents are interested parties who may have an interest adverse to those of the foster children.

AS A SEVENTH AFFIRMATIVE DEFENSE

19. On information and belief plaintiff foster parents have had plaintiff foster children in their homes from

*Intervenor Defendants First Amended Answer
and Cross Claim*

from two to five years. Under State law foster parents who have had foster children in their homes for two years or more are given rights which foster parents who have had foster children in their homes for less than two years do not have.

20. On information and belief the significance of a child's stay in foster care for two years rather than one year may be substantial for the foster child.

21. Plaintiff foster parents lack standing to sue as foster parents who have had foster children boarded in their home for less than two years and more than one year. Similarly, plaintiff foster children lack standing to sue as children who have lived in foster homes for less than two years and more than one year. Plaintiffs claim with respect to foster parents who have had foster children boarded in their homes for less than two years and more than one year is non-justiciable or there is no case or controversy stated with respect to it because there is no plaintiff before the Court who raises that issue.

AS AN EIGHTH AFFIRMATIVE DEFENSE

22. On information and belief plaintiff foster children have been separated from their natural parents for four years or more. Plaintiff foster children lack standing to sue as children who have been separated from their parents for less than four years.

*Intervenor Defendants First Amended Answer
and Cross Claim*

AS A NINTH AFFIRMATIVE DEFENSE

23. Plaintiff, Organization of Foster Families for Equality and Reform, Inc., lack standing to sue in this action.

AS A TENTH AFFIRMATIVE DEFENSE

24. Plaintiff foster children have no constitutional right to live in the home of particular foster parents with whom they were boarded by an authorized agency.

AS AN ELEVENTH AFFIRMATIVE DEFENSE

25. On information and belief a foster care review proceeding pursuant to Social Services Law section 392 to review the foster care placement of Danielle and Eric Gandy was commenced and pending in the Family Court of the State of New York, City of New York, at the time this action was commenced and plaintiff Madeline Smith is a party to said proceeding. On information and belief said foster care review proceeding is still pending undetermined in the Family Court of the State of New York, City of New York.

26. Subsequent to the filing of this action, defendant Dumpson and his agents promulgated a document entitled "Human Resources Administration Inter-Office Memorandum, Subject: Administrative Removal of Foster Children", dated June 25, 1974 and put into effect on or about August 5, 1974, setting forth procedural changes with regard to the removal of New York City foster chil-

*Intervenor Defendants First Amended Answer
and Cross Claim*

dren from foster homes when they were being moved to other foster homes or institutions.

27. On information and belief said procedure will be applicable to plaintiff foster parent Madeline Smith and plaintiff foster children Danielle and Eric Gandy.

28. Plaintiff foster parent Madeline Smith and plaintiff foster children Danielle and Eric Gandy have an adequate remedy under State law.

AS A TWELFTH AFFIRMATIVE DEFENSE

29. Repeat each and every allegation contained in paragraph 26 herein.

30. On information and belief said procedure will be applicable to plaintiff foster parents Ralph and Christiane Goldberg and plaintiff foster child Rafael Serrano.

31. Plaintiff foster parents Ralph and Christiane Goldberg and plaintiff foster child Rafael Serrano have an adequate remedy under State law.

AS A THIRTEENTH AFFIRMATIVE DEFENSE

32. On information and belief a habeas corpus proceeding for the custody of the children Cynthia and Cathleen Wallace was initiated in the Supreme Court for the State of New York, Nassau County, by the children's mother, Patricia Wallace, and plaintiffs Dorothy and George Lhotan are party defendants in said proceeding.

*Intervenor Defendants First Amended Answer
and Cross Claim*

33. Plaintiff Dorothy and George Lhotan have adequate remedy under state law.

AS A FOURTEENTH AFFIRMATIVE DEFENSE

34. Intervenor-defendants, individually and as a class, are natural parents who place their children in foster care with public and quasi-public "authorized agencies" by signing an instrument designated Authorization for Placement of Child in Foster Care, or since September 1, 1973, by means of an instrument entitled Authorization to Place Child in Foster Care (copies annexed hereto). Their children are, or will soon be, in foster care for a year or more. On information and belief said instruments are routinely executed by natural parents and by a Social Service representative. Said instruments contain no reference to foster parents and no provision that foster parents might be acquiring individual rights to the children of intervenor-defendants as a result of the signing of the foster care placement instrument.

35. In signing the instruments intervenor-defendants natural parents are led to believe or rely on the implicit representation of the foster care placement instrument and on explicit representations by Social Service representatives that the foster care placement is only with a Social Service official or an authorized agency and not with individual foster parents.

36. On information and belief, intervenor-defendants and the class they represent would not place their children in foster care if they believed that placement would be with an individual foster family and not with public agencies.

*Intervenor Defendants First Amended Answer
and Cross Claim*

AS A FIFTEENTH AFFIRMATIVE DEFENSE
(not before the Court)

• • •

CLASS ALLEGATIONS

40. Intervenor-Defendants seek to defend this action and to cross claim as a class under the Federal Rules of Civil Procedure 23 (a), 23(b)(1)A, 23(b)(1)B, and 23(b)(2).*

41. The class which intervenor-defendants, Rodriguez, Diaz, Robins, Shabazz and Collazo represent is that of all parents who have children in foster care placement under the aegis of one or more defendants and who placed their children by signing the form "Authorization for Placement of Child in Foster Care" or the form "Authorization to Place Child in Foster Care" (forms annexed). This form of foster care placement is commonly referred to as "Voluntary Foster Care Placement." There are currently at least 7,000 parents in this class.

• • •

AS AND FOR A CROSS-CLAIM AGAINST DEFENDANTS
DUMPSON, BEINE AND DALL

PRELIMINARY STATEMENT

46. Intervenor defendants, Rodriguez, Diaz, Robins, Shabazz and Collazo on behalf of themselves and all

* Boilerplate allegations omitted.

*Intervenor Defendants First Amended Answer
and Cross Claim*

other persons similarly situated assert a cross-claim against Defendants Dumpson, Beine, Dall pursuant to U.S.C. 1343 (3)(4), 42 U.S.C. 1983, 22 U.S.C. 2201, 2202, and Rule 57 and Rule 13 (g) of the Federal Rules of Civil Procedure. Intervenor defendants seek to have this Court declare that a parent who has "voluntarily" placed a child in foster care with the defendants is entitled to prior notice and a hearing when defendants propose to move intervenors' children from one foster home or institution to another foster home or institution. Intervenor defendants' natural parents claim that defendants failure to provide natural parents and members of their class with such notice and hearing violates their constitutionally protected rights as parents without due process of law and denies them the equal protection of the laws.

47. Intervenor natural parents placed their children in foster care on a temporary basis in order to deal with problems or crises in family life such as illness, destitution, or marital conflict. They were required to sign the authorization forms annexed hereto as Exhibit A or B. Defendants social services officials placed their children in foster homes pursuant to license and contract directly or through semi-public voluntary-authorized agencies.

• • •

49. On information and belief, after the children of Intervenor Diaz entered foster care they were placed by the Commissioner of Social Service at the New York Foundling Hospital and from January to June, 1974, the children—five siblings—stayed in the nursery maintained by the Agency.

*Intervenor Defendants First Amended Answer
and Cross Claim*

50. On information and belief, sometime in May, 1974 Mr. Rodriguez, a worker from the Agency told Mrs. Diaz that they were planning to move the children into several foster homes.

51. On information and belief, counsel for Mrs. Diaz telephoned Mr. Rodriguez and Mrs. Blatt, a worker at the Division on Inter-agency Relations of the Department of Social Services Agency and an agent and employee of defendants social service officials and requested that the children not be moved because a placement of the children would be challenged in legal proceedings and there was a possibility that they might be able to come home in several months.

52. On information and belief, counsel for Intervenor Diaz requested that the children not be moved because the children should be spared an unnecessary move and in addition, they would suffer by being separated from one another. On information and belief, Mrs. Blatt, agreed to hold up the proposed move of the children. Nevertheless, in early June 1974 the children were separated and moved to two separate foster homes.

53. On information and belief, Intervenor Diaz received no formal notice of the proposed move, nor was she ever advised that she had a right to ask for a hearing to protest the move.

• • •

60. The authorization to place children in foster care annexed hereto as Exhibit B consequently provides that

*Intervenor Defendants First Amended Answer
and Cross Claim*

the parent has a right to participate in planning for her child.

61. The decision to remove a child from one foster home or institution to another is always important to the child, and to the child's parent who retains the primary interest in her child's development. Therefore, her ability to participate in making the decision concerning the moving of her child in foster care is an essential aspect of planning for the child.

62. On information and belief, the move of a child can also have a negative affect of the parent's ability to maintain contact with the child and this is an independent reason why the moving of a child in foster care might affect its parents' interests.

63. On information and belief, the moving of a child in foster care is an occasion to determine whether the child should be returned home and in this respect also a removal of a child in foster care affects the interest of both parent and child.

• • •

65. The failure to provide notice and an opportunity for a prior hearing to parents before their children are moved from institutions or foster homes to institutions or foster homes, as described above, deprives the intervenor-defendants of parental rights without due process of law and violates State Law.

Wherefore, intervenor defendants pray that this court enter an order,

1. Dismissing the complaint herein.

*Intervenor Defendants First Amended Answer
and Cross Claim*

2. Declaring that intervenor defendants represent a class of natural parents whose children have been placed with defendants pursuant to an Authorization executed by the parents.
3. Declaring that intervenor-defendants are entitled to adequate notice and an opportunity for a due process hearing before their children are moved by defendants from one foster home or institution to another.
4. Such other and further relief as to the court may seem just.

MARTTIE LOUIS THOMPSON
Community Action for Legal Services Inc.
Attorney for Intervenor Defendants
335 Broadway
New York, New York 10013
966-6600
LOUISE GRUNER GANS
TOBY GOLICK, of Counsel

Trial Exhibit "A"

AUTHORIZATION FOR PLACEMENT OF CHILD IN AGENCY

Case No. 3109678

This is to certify that I, Edwin & Naomi Rodriguez, residing at 1030 Nelson Ave., Bronx, am the parents (Relationship) of Edwin Rodriguez (Name) 2/6/73 (Age) and that I authorize the Commissioner of Social Services of The City of New York or his duly authorized representatives to place the said child or children in any duly authorized agency as defined in the Social Services Law of the State of New York.

I specifically agree and consent that if the child or children hereinbefore named or any of them, while receiving care in any authorized agency or society for prevention of cruelty to children, is found to be in need of surgical or medical treatment, that such surgical and medical treatment may be administered under the direction of the authorities of the said authorized agency or society for the prevention of cruelty to children without further action on my part, and that such tests or examination as they deem necessary may be given to the said child or children for the purpose of determining the need of the said child or children for medical or surgical care. I further authorize the authorities of any authorized agency or society for the prevention of cruelty to children to give such child or children any treatment, inoculation or vaccination for immunization against contagious diseases as in their judgment may be necessary for the protection of such child's or children's health.

If I do not visit the child or children hereinbefore named while in an authorized agency, as defined in the

Trial Exhibit "A"

Social Services Law of the State of New York, for a period of twelve successive months or more and do not furnish a reason satisfactory to the Commissioner of Social Services of The City of New York or his duly authorized representatives for my failure to do so, the Commissioner of Social Services of The City of New York, in accordance with the authority vested in him by the Social Services Law of the State of New York, the Administrative Code of The City of New York, and the Domestic Relations Law of the State of New York, has the right to and may, if in his judgment it shall be for the best interest of the child or children hereinbefore named so to do, place out through a duly authorized agency the child or children named above in a free family home, with a view to subsequent adoption.

In witness whereof, I hereunto set my hand this 29 day of March, 1973.

Signed in the presence of

EDWIN RODRIGUEZ
Signature of Parent or Guardian

X*

* Naomi signs with a "X".

Exhibit B, Annexed to Answer

**AUTHORIZATION TO PLACE CHILD IN FOSTER CARE
HUMAN RESOURCES ADMINISTRATION
SPECIAL SERVICES FOR CHILDREN**

Case No. 3485802

I (We) Robins, Mary, residing at (House No. and Street) 1267 Grant Ave. (Apt. No. or C/O) 6E (Borough or P.O.) Bronx NY (Zip) 10456 (are) the (mother) (father) (legal guardian) of the child Robins, Corrie born on 9-3-68 and I (we) authorize the Commissioner of Social Services of the City of New York to place the child in a duly authorized agency as defined in the Social Services Law of the State of New York. I (We) understand that the Commissioner will inform me (us) of the agency with which the child is placed. I (We) also understand it is my (our) responsibility to keep that agency informed of (our) whereabouts and my (our) plans to resume caring for the child and of any delays which make continuation of placement necessary.

Placement is required because I (we) am (are) unable to make adequate provision for the support, maintenance and supervision of the child in his (her) own home or with relatives or friends.

I (We) anticipate placement will be required for no longer than 6 month(s). I (We) understand that when the reason for placement no longer exists, I (we) should ask for the child's return and that the Commissioner will return the child, provided that the Commissioner is satisfied that I (we) am (are) able to care for the child. In placing the child under the Commissioner's care, I (we) con-

Exhibit B, Annexed to Answer

sent to the administration of such immunization, tests and treatments, including dental and surgical treatment, as are considered necessary for the well-being of the child. I (We) understand that I (we) will be consulted, if possible, whenever surgery is necessary. However, in the event that the child requires emergency surgery or treatment, I (we) authorize the Commissioner to consent to such surgery or treatment if, for any reason, I (we) cannot be consulted. I (We) have been further informed and understand that:

1. I (We) and the agency with which the child is placed are expected to work cooperatively planning for the child and that the agency will offer me (us) whatever help is available to enable me (us) to decide what is best for the child. While the child is in placement, it is my (our) right and responsibility to visit the child regularly and to actively participate in planning until the child is to have the benefit of a permanent home, either with me (us) or in an alternative setting.

2. Under the laws of the State of New York if, for a period of six successive months, I (we) do not keep in contact with the child, my (our) failure to do so may be considered abandonment. In addition, if, for a period of one year, I (we) have not made efforts to plan for the child, my (our) failure to do so may be considered permanent neglect under the law. If either of the foregoing should occur, Court action may be taken to terminate my (our) parental rights.

3. Pursuant to the provisions of Section 358a of the Social Services Law, a proceeding may be initiated in the Family Court to obtain Court approval of this instrument

Exhibit B, Annexed to Answer

and the transfer of the case and custody of the child to the Commissioner of Social Services of the City of New York. In connection with such proceedings, I (we) do hereby consent to the jurisdiction of the Family Court over such proceedings.

4. I (We) waive notice of any such proceeding and service of the petition on me (us) as well as a hearing thereon. I (We) consent that the Family Court Judge's determination be made based solely upon the petition and other papers if any, that are submitted to the Court and to the entry of an order approving this instrument and the transfer of care and custody of the child to the Commissioner of Social Services of the City of New York, based upon said determination.

Dated this 8th day of January, 1974

MARY ROBINS
Signature of Parent or Guardian

Signed in the presence of

GERALDINE UNDERWOOD
Department of Social Services

Affidavit of Naomi Rodriguez

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *et al.*,

Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,

Defendants,

NAOMI RODRIGUEZ, *et al.*,

Intervenor-Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NAOMI RODRIGUEZ, being duly sworn, deposes and says:

1. That I am the mother of Edwin Rodriguez, a baby born on the 6th day of February 1973. Edwin Rodriguez was placed by me in foster care with the Commissioner of Social Services of the City of New York and through him, with the Harlem Dowling Children Service Inc., an authorized agency.

Affidavit of Naomi Rodriguez

2. For some time prior to the birth of my child, my husband had not been treating me well and had lost his temper and struck me on many occasions. Since I am blind I was very concerned as to how I was going to care for and protect my infant child under these circumstances. The hospital social worker suggested that I consider putting the baby in foster care until my problems with my husband were worked out and I accepted the social worker's suggestion that foster care might be a temporary solution.

3. After my baby was born, he required eye surgery and remained in the hospital and about the time he was ready to be discharged, Ms. Ingram, a social worker from the Bureau of Child Welfare, came to my house for me to sign a form to place my child in foster care. I told Ms. Ingram that I only wanted to place my baby temporarily for a period of up to six months so as to give me a chance to straighten out my marital difficulties. Ms. Ingram expressly told me that she agreed to the conditions under which I wanted to place my child and assured me that I could have my baby back when I wanted him.

4. Ms. Ingram read the form, Authorization for Placement of Children in Foster Care, out loud to me before I signed it but I didn't understand the language of the form very well since it is full of legal and other words that I didn't understand, but I signed the form anyway because the important thing to me was Ms. Ingram's assurance that I was placing the baby in foster care only temporarily to resolve my marital difficulties and that I would have no trouble getting him back. I thought that I could depend on what Ms. Ingram said to me and didn't think it was important for her to write it down.

Affidavit of Naomi Rodriguez

5. Ms. Ingram told me that I would be able to visit my baby but she didn't tell me how often these visits would be.

6. Some time after I signed the form my baby, Edwin, was put in charge of the Harlem Dowling Children Service, Inc., an agency, and through them in a foster home. My social worker at the agency is a Mrs. Green.

7. For the first few months after I signed the placement from Harlem Dowling Children Service Inc. didn't let me visit my child. After that, they generally let me see the baby once or twice a month. Though I asked Mrs. Green to let me take my baby home for weekends, she refused my request.

8. In May 1973 I separated from my husband and went to live with my mother. Since I was no longer living with my husband, I felt it was safe to take the baby home and asked Mrs. Green to return my child to me. Mrs. Green never gave me a definite answer to my request and I regularly kept calling her and going to see her to ask when she would return my child only to have my questions ignored.

9. In January 1974, finally, Mrs. Green told me that the agency was refusing to return the child because of my blindness and because I needed mobility training to cope with my blindness, and needed a larger apartment.

10. I didn't place my baby in foster care because of my blindness. I am the mother of an older child, Elizabeth Pauline, who was born on February 25, 1971 and I had always been able to take care of her. I am close to my

Affidavit of Naomi Rodriguez

family and they have always helped me so that my blindness was not a handicap. Throughout this time and from the very beginning I felt that I was completely at the mercy of the agency and had no rights. At no point did the agency tell me that since I wanted my baby back I had a right to go to court and ask the court to return my child to me. It wasn't until April 1974 that my mother suggested that perhaps I should see a lawyer, and I consulted an attorney at Bronx Legal Services. At no time before or after I agreed to place my child in foster care and signed the foster care form did anyone ever tell me that foster parents with whom my baby was placed might claim that they had a right to keep my child. The agency tells me very little about my child and I don't even know whether he has been in one foster home or several. If I had known what putting my child in foster care really meant: that I would have very little chance to see my baby and that my baby would not be returned to me when I asked for him and how much I would be at the mercy of the agency, I would never, never, never have agreed to put my baby in foster care or signed the form they gave me to sign.

11. I am now told by my lawyer that foster parents are claiming that they have equal or greater rights than I to children like mine. If I had ever been told, or known, that individual foster parents could be given such rights, I never, never, never would have placed my child in foster care.

12. I was assured that my baby would be returned to me as soon as I resolved my marital difficulties, which I

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Affidavit of Naomi Rodriguez

had done barely two months after I signed the form, but the promise turned out to be a lie.

NAOMI RODRIGUEZ

Sworn to before me this
17th day of October, 1974.

Witnessed by (Illegible)

LOUISE GRUNER GANS
Notary Public, State of New York
No. 31-406525
Qualified in New York County
Commission Expires March 30, 1975

73a

Affidavit of Sara Ruff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *et al.*,
Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,
Defendants,

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SARA RUFF, being duly sworn, deposes and says:

1. I am the mother of Rosalyn and Rosemarie, two little girls born on May 25, 1970. In June 1970 I signed an Authorization for Placement of Children in Foster Care, a copy of which is annexed hereto.

2. I signed the form right after I had given birth to my children while still in the hospital. The form was brought to me by a representative of the Commissioner of Social Services of the City of New York. I signed the foster

Affidavit of Sara Ruff

care placement form because I was a minor with no apartment or money of my own. I was told by a Department of Social Services worker that the placement was only temporary, since I did not want to place my children for adoption. I didn't understand what the form that I signed meant but felt that I had no choice but to sign it anyway.

3. Shortly after I signed the foster care placement form my children were taken to the New York Foundling Hospital and I was told that from that time on they were the agency caring for my children. For a year after my children were taken to the New York Foundling Hospital they remained in Manhattan and I was able to visit them every week at the New York Foundling Hospital. Then, in the Spring of 1971 the New York Foundling Hospital told me they were planning to move my children. Since I lived on Staten Island, I asked them to find a foster home in Staten Island or in Manhattan so that I could continue seeing the children often. Instead, I was told that the children were being moved to a foster home in Westchester County and my objection that it was very far away for me, made no difference.

4. Some time in June 1971 the children were placed in a foster home in Westchester County. From then on I could see my children only at the Westchester office of the New York Foundling Hospital in Yonkers and I was not permitted to see them more often than once a month.

5. The trip to Yonkers from Staten Island took about three hours each way and cost over \$3.00 each way, making the visits extremely difficult and expensive for me. When the children were moved from Manhattan to Westchester I was not given a notice and a right to object to

Affidavit of Sara Ruff

the move of my children at a hearing, yet the drastic reduction in the frequency with which I could see my children, the enormous difference in traveling time and cost imposed a severe burden and loss on me.

6. While the children were in Manhattan and I saw them weekly we developed a warm relationship. Therefore, from the point of view of the children as well, I didn't think it was right to move them to a place where they would be able to see me, their mother, so much less often.

7. My children were placed in the home of a childless couple, who now do not want to return them to me. Since the foster parents have had my children for more than two years, they can and are now opposing me in my claim for the return of my children in a habeas corpus proceeding and in a foster care review proceeding pursuant to section 392 of the Social Services Law in the Family Court. I had never been told, when I signed the form or later, that foster parents could refuse to return my children to me.

/s/ SARA RUFF

Sworn to before me this
21st day of October 1974.

LOUISE GRUNER GANS
Louise Gruner Gans
Notary Public, State of New York
No. 31-406525
Qualified in New York County
Commission Expires March 30, 1975

Exhibit "A"**PLACEMENT AGREEMENT**

Form M-912u
Rev. 12/15/67

THE CITY OF NEW YORK—DEPARTMENT OF SOCIAL SERVICES
BUREAU OF CHILD WELFARE
2 Lafayette Street
New York, N.Y. 10007

A. We, as foster parents of children boarded in our home by the Department of Social Services, Bureau of Child Welfare, understand that

1. Board is paid for each child at the established monthly rate.
Clothing for each child is provided by cash allowance to the foster mother; provisions are made for health and medical care; and reimbursement is made for certain incidental expenses as explained in the Foster Parents' Manual.
2. The Department of Social Services provides the services of a Caseworker who makes regular visits to the foster home, and helps the family with plans for the child's progress and development, and with special problems as they arise.
3. Visiting between the child and the relatives, whether in the home or elsewhere, is arranged by the Department of Social Services.
4. The Department of Social Services has the responsibility for planning for the child, including decisions

Exhibit A

for his removal from the foster home, either to his own family or placement elsewhere.

B. As foster parents we agree to the following:

1. We will assume responsibility for the day-to-day care of the child and will share with the child the activities in our home, church and community. Through the Caseworker, we will keep the Department of Social Services aware of the child's progress in our home.
2. We will notify the Department of Social Services of any expected change in our household, such as change in sleeping arrangements for the foster child, change in family composition, a move to a new address, and agree not to board or lodge children or adults from any other source or obtain employment outside the home without first obtaining the approval of the Department of Social Services.
3. We agree to cooperate with the Department of Social Services in arrangements for visits between the child and his relatives.
4. We agree to obtain the permission of the Department of Social Services before taking the child away from our home on an overnight visit or for a longer period.
5. We will let the Department of Social Services know at once if medical care is indicated for the child. The foster mother will take the child to the appropriate hospital, clinic, or physician, as arranged with the Caseworker.

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Exhibit A

6. We agree to cooperate and comply with all plans of the Department of Social Services for the transfer or discharge of a child from our home.

CHRISTIANE GOLDBERG
Signature of Foster Mother

RALPH GOLDBERG
Signature of Foster Father

Bureau of Child Welfare

Caseworker ILLEGIBLE Date May 22, 1963

79a

Exhibit B

CATHOLIC GUARDIAN SOCIETY
122 East 22nd Street
New York, N. Y. 10010

Telephone: ORegon 7-5000

AGREEMENT BETWEEN CATHOLIC GUARDIAN SOCIETY
AND FOSTER PARENTS

- I. When a child is accepted for board by Foster Parents, it is with the understanding that the child shall be returned to the Agency upon request, realizing that such request will only be made for good reason. If for some reason the Foster Parents wish to have a child transferred from their home, sufficient time shall be given for the Agency to make suitable plans for the child.
- II. Catholic Guardian Society agrees to provide a monthly stipend for each child, according to age.
- III. Catholic Guardian Society also agrees to provide the following:
 1. Casework service for each child.
 2. Use of psychiatric, psychological, vocational services as they are needed.
 3. Clothing allowance every three months.
 4. Reimbursement for medical, dental and eye examinations and for prescriptions given.

Exhibit B

Extensive work should be discussed with Worker prior to the work being undertaken.

5. Reimbursement for school textbooks and tuition and carfare to and from the Agency if prior approval has been given by the caseworker.

IV. Catholic Guardian Society acknowledges that under the law Foster Parents, who care for a child, or children for twenty-four consecutive months, shall have preference for adoption if they so desire.

V. Foster Parents agree to provide each child with the following:

1. Competent adult supervision at all times.
2. Religious training in the specific faith of each child and responsibility for weekly attendance at church services.
3. Adequate diet, clothing, bathing, toilet and lavatory facilities.
4. School supplies, such as pencils, pens, notebooks and paper and school carfare.
5. Medical supplies usually found in family medicine cabinets.
6. Haircuts.

Exhibit B

7. Allowance for each child. (Please refer to "Guide for Foster Parents").

8. Shoe Repair.

Catholic Guardian Society
Archdiocese of New York

JAMES P. O'NEILL
James P. O'Neill
Executive Director

We agree to accept children for board subject to the foregoing rules and regulations of the Catholic Guardian Society.

Husband's Signature

Date: 2/20/71

MADELINE SMITH
Wife's Signature

JPO'N:is

Answer of New York City Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2010 (RLC)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *et al.*,

Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,

Defendants.

Defendants, Dumpson, Beine and Dall, by their attorney, W. Bernard Richland, Corporation Counsel, answering the "Second Amended Complaint",

1. Deny the allegations set forth in paragraph "1" thereof except admit that this action was brought to establish the validity of said allegations.

2. Deny the allegations set forth in paragraphs "2" and "3" thereof.

3. Deny the allegations set forth in paragraph "4" thereof except admit that plaintiffs will attempt to establish the validity of the first sentence thereof.

Answer of New York City Defendants

4. Deny the allegations set forth in paragraphs "5", "6", "7", "8", "9", "10", "11", and "12" thereof.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" thereof.

6. Deny the allegations set forth in the first sentence of paragraph "15" thereof and deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the last sentence of said paragraph.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the last phrase of paragraph "16" thereof.

8. Deny the allegations set forth in the first sentence of paragraph "17" thereof.

9. Deny the allegations set forth in the second sentence of paragraph "18" thereof and respectfully refer the Court to New York Social Service Law §395 *et seq.* for their full content and legal effect.

10. Deny the allegations set forth in the last phrase of paragraph "21" thereof.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "23" and "24" thereof.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "26" and "27" thereof except deny the allegations set forth in the first sentence of said paragraph "26".

Answer of New York City Defendants

13. Deny the allegations set forth in paragraphs "28" and "29" thereof.

14. Deny the allegations set forth in the first sentence of paragraph "31" thereof.

15. Deny the allegations set forth in paragraphs "32", "33", "34", "35", "36" and "37" thereof.

16. Deny the allegations set forth in the first sentence, the first half of the second sentence and the third sentence of paragraph "38" thereof.

17. Deny the allegations set forth in paragraphs "39", "40" and "41" thereof.

18. Deny the allegations set forth in the last phrase of paragraph "43" thereof.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "44", "45", "46", "47" and "48" thereof.

20. Deny the allegations set forth in paragraph "50" thereof.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "51" and "52" thereof.

22. Deny the allegations set forth in paragraphs "53", "54", "55", "56", "57", "58", "59", "60", "61", "63", "64", "66", "67", "68", "69", "70", "71", "72", "73", "74", "75", "76" and "77" thereof.

Answer of New York City Defendants

FURTHER ANSWERING THE COMPLAINT AND AS A FIRST SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE:

23. The complaint fails to allege a deprivation of rights within the meaning of the Fourteenth Amendment to the Constitution and thus this Court lacks subject matter jurisdiction over this action.

AS A SECOND SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE: .

24. The complaint fails to state a cause of action.

AS A THIRD SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE:

25. The statutes and regulations herein under attack are sufficiently protective of and do not deny such rights as are possessed by the plaintiffs herein.

AS A FOURTH SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE:

26. Procedures recently adopted by the City defendants herein are sufficiently protective of and do not deny such rights as are possessed by the plaintiffs herein.

WHEREFORE defendants pray that this Court enter judgment in their favor dismissing the complaint and declar-

Answer of New York City Defendants

ing the statutes and regulations herein under attack as constitutional and not violative of plaintiffs' rights.

Yours, etc.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for New York City
Defendants
Office & P. O. Address:
Municipal Building
New York, New York 10007
566-4619/2192
By: ELLIOT P. HOFFMAN
Assistant Corporation
Counsel

Dated: February 28, 1975

Affidavit of Carol J. Parry

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 2010 (RLC)

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *et al.*,
Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CAROL J. PARRY, being duly sworn, deposes and says:

1. I am the Assistant Commissioner for Special Services for Children in the New York City Department of Social Services, and I submit this affidavit in support of the proposed judgment submitted by the New York City municipal defendants. I am a successor to defendant Beine in this action.

2. I have a Master's Degree in Social Work from the University of Connecticut School of Social Work and I

Affidavit of Carol J. Parry

am a Board member of the National Association of Social Workers. I have been an instructor in field work at both the Columbia University School of Social Work and the Hunter College School of Social Work. I have also been a Faculty Associate at the New School for Social Research. This affidavit is submitted by me both in my capacity as a public official and as a professional social worker.

3. On May 20, 1974, when I assumed my present position, this agency was in the process of revising its pre-removal procedures. That revision resulted in the procedure described in the Court's recent opinions. While this litigation concededly was the impetus for the revision, the underlying determinations to change the procedure was made from a different perspective than the thrust of this litigation.

4. Foster care, as viewed by the public policy of this state and by this agency, is a temporary but necessary alternative to a child residing with either its natural parents or adoptive parents. Admittedly, the word, "temporary" is often as much a hope as it is a fact, but our goal remains to transfer as many children as soon as possible out of foster care.

5. Foster care is provided by either a direct relationship between the City and the foster parent or by contract with approximately ninety voluntary agencies. Those agencies, with whom more than 85% of the foster children are placed, then contract directly with the foster parents and supervise the foster homes.

Affidavit of Carol J. Parry

6. We, of course, agree with and subscribe to the conclusion of this Court regarding the absence of any legal entitlement of foster parents to maintain a foster care relationship. However, because we entrust foster children to their care and day to day supervision, their objection to the termination of a particular relationship is important to us. A hearing, similar to that originally suggested by plaintiffs, was thus viewed by this agency as an appropriate, although by no means perfect, method by which foster parents could call our attention to what they perceive as an improper decision.

7. In initiating our new procedures we assumed that there would be relatively few instances in which the foster parent would dispute a decision to remove a foster-child from their home. In those instances where there would be disagreement the hearing would serve both as a method of resolving such disputes and of monitoring the operations of the agency with a minimum reallocation of extremely limited resources.

8. Our assumption regarding the relative infrequency of disputed removals has been proven correct as evidenced by the fact that there were only 16 hearings during all of 1975. (I am informed by counsel that plaintiffs have implied, if not directly alleged, that some of the voluntary agencies with whom we contract are not following the presently mandated procedure, thus minimizing the number of hearings requested. While this may be true to some extent, they have not called to our attention a single specific instance of such failure. We therefore feel justified in assuming that even if there were full compliance with presently mandated procedures, the number of requested hearings would not be significantly greater).

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9. In contrast to the extremely limited number of requested hearings, which were the only type of hearings discussed in this litigation prior to the decision, the decision mandates between 1,600 and 4,200 hearings a year, depending on its ultimate applicability.

10. In the short time available to us since the decision, we have assembled data in an effort to estimate the implications of this decision. Based on a study of the months of December 1975 and January 1976 we expect that during the next year these will be at least 4,200 removals or changes of status of children who have been in foster care in a particular home for more than one year. Approximately half of these children will be discharged from foster care. Of those discharged at least thirty-five percent will be returned to their natural parents with another five percent returning to relatives other than natural parents. Twenty-five percent will be adopted by their foster parents, and another five percent will be adopted by others. The remaining children will be discharged because they reach the age of majority.

11. Of those children moved within foster care at least a third will be moved as a result of the request of a foster parent, with four to five percent more being moved because of other reasons relating to the unavailability of the foster home, i.e. the death of the foster parent or movement out of state. These particular estimates were verified by a random but statistically significant check of the transfers in two of our direct care offices and by data provided by the Child Welfare Information Service Inc. based on a sampling of voluntary child care agencies. The myriad of other reasons for transfer have

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not been tabulated, but they include transfer to another foster home for a possible adoption, reuniting siblings and inadequacy of the foster home.

12. The order which we have submitted herewith reflects both our understanding of the Court's decision and our concern over the institution of a large new bureaucratic apparatus prior to our having the opportunity to fully litigate its appropriateness before this Court and receiving a final determination from the Supreme Court.

13. Although the various figures above cited include instances of adoption, we assume that they are not to be included in this hearing process as adoptions take place only after judicial review (Family Court Act §641). Additionally, we view adoptions by the foster parents as outside the ambit of this Court's decision as they do not represent removal from a home but merely a change in status.

14. In addition to adoptions, there are numerous other instances of removal pursuant to various Court orders, the most common being writs of habeas corpus. We have specifically excluded those situations as the Court proceedings themselves provide for hearings.

15. The general concern shared by all the parties to this litigation regarding the need for a speedy determination is heightened in emergency situations. Our current procedures exclude emergency situations from their applicability. (In defining emergency we have been guided generally by the definitions of neglected and abused children set forth in Social Services Law Section 371). Regardless of the speed at which a hearing procedure moves, even

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a day's delay in the instances enumerated in that statute can have repercussions of a far more serious nature than a possible wrongful removal. We do not understand the plaintiff to contend otherwise. Our proposed order has therefore excluded those instances from the hearing procedure.

16. At present there is no unit in our agency designed to exclusively represent children. However every decision relative to children is made by one or more experienced case workers in accordance with the best interest of the child under state law. While the ultimate affirmance of the Court's full decision might administratively warrant the establishing of such a unit, we see nothing in the opinion mandating its establishment. The clear implication of the Court's opinion is that the individual representative be independent of the original decision to remove the child and we have so provided.

17. In addition to the decretal paragraphs reflecting the Court's opinion we have requested both a stay of enforcement and reargument of portions of the decision.

18. As Judge Pollack anticipated in his dissenting opinion, the provision of hearings when not requested by the foster parent has come as a surprise to this agency. Both the underlying assumptions leading to this provision and the resulting problems are of an entirely different magnitude than results predictable from any of the claims made in this litigation.

19. This agency has operated, as any agency must, under the assumption that its decisions are neither arbitrary nor capricious. There are literally thousands of significant decisions made each day by this agency and

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the contracting agencies. Admittedly the decision to transfer a child out of a foster home is one of the most significant made. These decisions are not lightly made however, as evidenced by the fact that other than discharges there was only one move in the last year for each ten members of the plaintiff class. The basic correctness of these approximately sixteen hundred transfers is further evidenced by the fact that only one foster parent in a thousand sought to review the decision. We are thus confronted with a mandate, if a stay is not granted pending reargument, that we conduct several thousand hearings a year without the opportunity to rebut the underlying premise on which the Court based its mandate.

20. What is perhaps more significant is the absence of any showing that an uncontested hearing, when such hearings are held by the thousands, will provide any better results than a decision-making process based on the continuing relationship between caseworker and family.

21. The presumption that a decision is correctly made is further strengthened when the child is being returned to its natural parents. The Court in its decision has acknowledged the primacy of the natural family relationship over the foster family. Yet it has mandated hearings not only in the seven or eight instances a year when there is a serious dispute as to the propriety of the return to this natural state, but also in those six or seven hundred instances where no one disputes the return.

22. We therefore request that the Court give us an opportunity to fully litigate the need for unrequested hearings. If this opportunity is granted we will demonstrate (a) the deliberate manner in which decisions are made

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(b) the inapplicability of the hearing process to significant numbers of transfers, particularly those instances in which the removal is requested (if not demanded) by a foster parent or teenage child (c) the inordinate costs and delays resulting from the granting of these hearings.

23. We also urge upon this Court that it grant a stay of this decision to the extent provided in our proposed order. There are neither resources nor personnel presently available to institute the procedures under which we would conduct the thousands of hearings mandated by the Court's opinion. Nor would it be just to require us to set up an entire apparatus when the legal necessity of such a procedure has not been finally determined.

24. I have been informed by counsel that when the issue of a possible stay was raised during a colloquy with the Court, the Court advised that a stay granted to defendants would necessitate maintaining the status quo for plaintiffs as well. We submit however that maintaining the status quo in the vast majority of instances, by prohibiting uncontested removals, would be inimical to the best interest of the children.

s/ CAROL J. PARRY

Sworn to before me this
7th day of April, 1976

s/ SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 3762
Certificate filed in New York County
Commission Expires March 1, 1977

Child Caring Agency Request For Approval Of:
(Form W-853, 8 pages)

[PHOTOSTATS]

(Opposite) 

CHILD CARING AGENCY REQUEST FOR APPROVAL OF:																			
<input type="checkbox"/> REPORT ON 60-DAY PLAN		<input type="checkbox"/> INITIAL SEMI-ANNUAL REVIEW																	
<input type="checkbox"/> ANNUAL REAUTHORIZATION	<input type="checkbox"/> SUBSEQUENT SEMI-ANNUAL REVIEW(S)	<input type="checkbox"/> INITIAL 18-MONTH COURT REVIEW	<input type="checkbox"/> SUBSEQUENT BIENNIAL COURT REVIEW(S)	<input type="checkbox"/> EXTENDED CARE															
ON BEHALF OF																			
Surname of Child	First	M.I.	Date of Birth	Type of Placement <input type="checkbox"/> Volun. <input type="checkbox"/> 358a App'd <input type="checkbox"/> Ct-Pl'd <input type="checkbox"/> 382 App'd	Initial Placement Date	Date Placed in your agency	382 SSL Docket No. if any	City Bill Number											
TO: THE CITY OF NEW YORK, DEPARTMENT OF SOCIAL SERVICES, SPECIAL SERVICES FOR CHILDREN <input type="checkbox"/> 80 Lafayette Street, New York, N.Y. 10013 <input type="checkbox"/> 192 East 151st Street, Bronx, N.Y. 10451 <input type="checkbox"/> 1274 Bedford Avenue, Brooklyn, N.Y. 11216 <input type="checkbox"/> 185-15 Archer Avenue, Jamaica, N.Y. 11433 <input type="checkbox"/> 2 Lafayette Street, New York, N.Y. 10007							Child's Social Security Number		Child State Case No.										
							DATE PREPARED _____ 19 ____												
							DATE DUE _____		Month: Day: Year										
FROM: _____			Name of Agency		State Agency Code No.		Supervisor												
			Division		Worker		Telephone No.												
Name of Agency with major casework responsibility _____																			
SSC Data	Case Surname	Case Number	Team/Cld.	Division/Borough Office		Worker	Telephone No.												
Cross-Reference (Other Names Known by)		Type of Placement Facility <input type="checkbox"/> F.H. <input type="checkbox"/> Inst. <input type="checkbox"/> G.R. <input type="checkbox"/> G.H. <input type="checkbox"/> A.O.B.H.		P.A. Case Number/Category			Income Maintenance Center												
Name and Address of Foster Parents or Facility _____																			
Child's Siblings		Date of Birth	WHEREABOUTS If at home, list address If in placement, name of agency			Type o-Placement If any	Initial Placement Date If any												
Surname	First	M.I.																	
1.																			
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Child's Father's Full Name					Mother's Full Name (incl. Maiden Name)														
Address					Address														
Social Security Number					Social Security Number														
I. Original Reason for Placement _____																			
FOR SSC USE ONLY:																			
<input type="checkbox"/> 60-Day Plan <input type="checkbox"/> Initial Semi-Annual Review <input type="checkbox"/> Subsequent Semi-Annual Review(s)					<input type="checkbox"/> Annual Reauthorization <input type="checkbox"/> Extended Care <input type="checkbox"/> Suspended Payment (where appropriate)														
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FORM W-853 P.I. Rev. 7/15/75 100M-DPM 908133 (78)																			

Please answer all questions, where applicable. (Use additional sheets of paper, if necessary)

II. Child in Care

A. Physical Health

Date of last physical checkup	Height	Weight	Inoculations given since last report	Date of last dental checkup	Date of last ocular checkup

Statement of health. Note diagnosis, treatment and follow-up, where indicated. (Include significant changes, illnesses, or accidents.)

B. Psychological and Psychiatric Examinations

Date of last psychological	Type of test given	I.Q. Score	Date of last psychiatric	Diagnosis*	Prognosis

*Is treatment contemplated? ☐ Yes ☐ No If "Yes", indicate why and type of treatment recommended.

C. Family Planning Services (to meet New York State Regulations)

1. For a child in foster home boarding care, 12 years of age or older, has foster parent been notified by required letter of the availability of family planning services? If not, why not? If services were requested, how were they provided?

2. For a child in group care, 12 years of age or older, were family planning services considered and offered? How were they provided? If not provided, why not?

D. Social Adjustment

1. Composition and description of child's living arrangements, including type of child care facility.

II. D. Social Adjustment (continued)

2. Description of child's psycho-social and psycho-sexual adjustment, including understanding of placement.

3. Relationship to peers, agency, community and, if appropriate, to foster family (include latter's own children, if any).

E. Educational and Vocational

1. Type of school, grade level, reading and mathematics levels, and adjustment.

2. Problem areas and remedial help provided.

3. If child is 14 years or over, vocational and academic goals.

F. Religious Education

Describe religious education provided. If child has been placed out of religion, describe specific arrangements made for religious training.

III. Resources and Living Arrangements of Natural Family

A. Describe family's living arrangements and composition of the household.

B. Financial

1. What is family's current source of income? Include date(s) and means of verification. If family is receiving public assistance, include name and address of Income Maintenance Center and case number.
2. If employed, give name and address of each person's employer, total income and major expenses. Expenses should include rent and unusual expenses, such as payments for support, etc.
3. Describe any changes in family's financial situation since last report. Include family's new address, if they have moved.
4. What medical insurance does family have? Give name of insurance carrier and identification number.

C. Benefits and Resources

1. Indicate whether child receives any benefits from Social Security, SSI, trust funds, law suits, etc., or may be eligible for or entitled to receive such.
2. If natural parent(s) is (are) deceased, give circumstances and date(s) of death.

IV. Planning and Goals

- A. 1. What is your long-range plan for the child?
- ☐ Discharge (Please fill out Section IV. B.)
 - ☐ Adoption (Please fill out Section IV. C.)
 - ☐ Continued Care (Please fill out Section IV. D.)

IV. Planning and Goals (continued)

A. 2. Has your plan changed since last report? If yes, explain.

3. Has the last 24-Month Family Court Review disposition required a change in plan? If so, explain. How has it been implemented?

COMPLETE EITHER SECTIONS B, C, OR D, ACCORDING TO GOAL CHECKED UNDER "IV. A." THEN COMPLETE SECTION V.

B. Goal: Discharge

1. Will the child be discharged to natural parents, extended family, significant others, or self? What is projected date to attain discharge goal? If discharge is to self, what will be the child's living arrangements and means of support?
2. Discuss preparation for discharge, including that for child, natural family, significant others, and foster family, if appropriate.
3. If child is being discharged to family or significant others, indicate total adjustment of family with an assessment of strengths and weaknesses, including any problem with siblings in family.

4. What are the present barriers, if any, to the discharge?

IV. Planning and Goals (continued)

B. Goal: Discharge (continued)

5. What specific services will be offered to overcome these barriers?

C. Goal: Adoption

1. When was the plan for adoption approved?

2. If appropriate, what is the parent's attitude toward surrender?

3. Is child free for adoption? If so, give the date and method by which child was freed.

4. Has adoption or subsidized adoption been discussed with the foster parents? If not, why not? Describe attitude of foster family.

5. If more than three months have elapsed since the plan for adoption was approved, and child is not yet free, what steps have you taken to free the child? Explain.

6. If child has been freed for three months, what steps have you taken to recruit an adoptive home? On what Adoption Exchanges has the child been registered?

7. What is projected date to attain adoption goal?

8. If you plan to continue contact with family and/or significant others after adoption, please explain.

IV. D. Goal: Continued Care

1. Problems centering in child which necessitate continued care as a long-range service plan.

(a) Child has severe problem

1. Describe child's problem and explain specifically why it necessitates continued care as the long-range service plan.

2. Describe services given child specific to child's problem.

3. Describe services offered to the natural family and/or significant others regarding child's problem.

4. What is anticipated length of time child will need continued care?

2. Problems centering in natural family which necessitate continued care as long-range service plan.

(a) Unable to plan

1. Specify parents' problems which prevent them from adequately caring for child, including serious financial mismanagement.

2. Indicate services offered to overcome these problems. Explain, including specific goals. Give family response to services.

(b) Whereabouts of natural family unknown

1. What efforts have been made during the past year to locate parents?

IV. D. Goal: Continued Care (continued)

2. (b) Whereabouts of natural family unknown (continued)

2. Have you requested us to register such parents with our Law Enforcement and Registration Unit as missing persons? If yes, give date and results.

3. Extended family and significant others - If natural family is unable to plan, is unknown, or deceased, describe efforts to involve extended family and/or significant others.

V. Visiting Arrangements

A. Visiting between child and natural family.

1. What is the current visiting plan? Give dates and locations of family and/or significant others' visits that have already taken place. Include participants.

2. Dates and locations of visits with siblings in care. Include participants.

3. What is the projected plan for continued family and sibling visits?

**Excerpts from Testimony (at Trial and by
Deposition in Lieu of Trial)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR QUALITY
AND REFORM, *et al.*,

Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,

Defendants,

NAOMI RODRIGUEZ, *et al.*,

Intervenor Defendants.

DEPOSITION OF DR. SHIRLEY JENKINS, taken before
Morene B. Korenman, Notary Public of the State of New
York, held at 622 West 113th Street, New York, New
York, on the 11th day of April, 1975, at 1:45 p.m., pur-
suant to notice.

Excerpts from Deposition of Shirley Jenkins

APPEARANCES:

[2]* MARCIA ROBINSON LOWRY, Esq.
Attorney for Plaintiff, Foster Parents
New York Civil Liberties Union
84 Fifth Avenue
New York, New York

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
2 World Trade Center
New York, New York
By: STANLEY L. KANTOR,
Assistant Attorney General
of Counsel

LOUISE GRUNER GANS, Esq.
Attorney for Intervenor Defendants
Community Action for Legal Service
335 Broadway
New York, New York

SHIRLEY JENKINS, having been first duly sworn by
Morene B. Korenman, Notary Public of the State of New
York, was examined and testified as follows:

Examination by Mrs. Gans:

• • •

[3] Q. Professor Jenkins, what position do you occupy
at present? A. Professor of Social Research, Columbia
School of Social Work.

• • •

* Figures in brackets refer to each new page of the Stenographic
Transcript.

Excerpts from Deposition of Shirley Jenkins

By Mrs. Gans:

Q. Has your work concerned itself with foster care?

A. Yes, I have been working in relation to foster care, I would say, for over fifteen years in the research capacity.

Q. Have you published books in the field of foster care?

A. Yes, I have published, I guess, four books and a number of articles in professional journals and I have been director of three studies.

Q. Could you name the books and the studies? A. Yes. At the Community Council of Greater New York, I was director of a study on entry into foster care which resulted in a book called *Paths to Child Placement: Family Situations Prior to Foster Care*. That is Community Council of Greater New York, [4] published in 1966.

I was research consultant on the study for the Westchester Children's Association, resulting in a publication in 1964 entitled *Total Treatment for Emotionally Disturbed Children in Foster Care*.

I have been director for ten years of the Longitudinal Study, Family Welfare Research Program at the Columbia University School of Social Work. The first book from that study is *Filial Deprivation and Foster Care*, with Elaine Norman, published by Columbia University Press in 1972.

The second book from that study is forthcoming, also from Columbia University Press, called *Beyond Placement: Mothers View Foster Care*. It is in galley form now, will be published in October 1975.

I also have another book that is called *Priorities in Social Service: Child Welfare in New York City*, pub-

Excerpts from Deposition of Shirley Jenkins

lished by Praeger, done by the New School for Social Research and published in 1971.

• • •

[5] Q. Is the research program that you referred to the same research program out of which Professor Fanshel's studies emerged? A. It is. We studied the same basic population, that is, children who entered care in 1966 in New York City. He concentrated on what was happening to the children and I concentrated on what was happening to the families.

We followed those families up, we interviewed the families at three points in time.

• • •

[16] Q. Professor Jenkins, on the basis of your study, what were the reasons—the major reasons for placement which you found? A. Let me first go back. In the previous study at the Community Council of Greater New York, we worked out a series of major placement reasons and that scheme was followed also in this study, *Filial Deprivation*.

By reason children enter care, we are looking in a way, for the straw that breaks the back. In other words, not a generalized reason, but the specific fact that made the difference from the child being at home or into care.

In this study of the families that we interviewed, 22 percent had children entering care because of the mental illness of the mother, 16 percent child behavior where the child was emotionally disturbed and needed special treatment, 14 percent were neglect and abuse cases, 11 percent the physical illness of the mother, 11 percent the unwillingness or inability of persons other than the

Excerpts from Deposition of Shirley Jenkins

family to continue caring [17] for a child, 9 percent severe family dysfunction, 8 percent were unwillingness of inability of the mother to assume care of the child, 8 percent were abandonment or desertion.

• • •

Q. And the category "unwillingness or inability to assume care"? A. That was primarily unwed mothers who had babies and wanted some time to establish themselves and so they put the babies into foster care.

A great many of those then took the babies home. Sometimes they returned to school, sometimes they got married and then they brought the babies back.

• • •

[18] Another category which was mentioned, unwillingness or inability to continue care, is one way in which children come into care, and that is, a child is left in the care of a relative or a neighbor or a friend and the mother leaves it, maybe, for a very short time, or maybe indeterminate, or maybe her plans were changed.

The person with whom the child was left will call the police and the Welfare Department and say, "I have this child. I can't take care of them any more. I am not responsible for it. Take the child."

• • •

There are situations where there will be a mental breakdown on the part of the mother, very often related to severe stress, and a social worker may arrange for a child to be cared for until the [19] mother can resume care.

Excerpts from Deposition of Shirley Jenkins

The child behavior situation is very typically one in which the parents have been told that the child is in need of residential treatment and that will be a worked-out arrangement for the child to go into care.

The neglect case is often one in which the court is involved, in which an objection is raised and the child is removed from the home.

• • •

[21] There are cases where parents are actually very much opposed to the children going into care and those are primarily the cases where they enter by court. They know about it but they are against it.

[24] Q. Professor Jenkins, in your study Filial Deprivation and Foster Care, did you deal with the question of parents understanding foster care placement [25] or how they viewed foster care placement?

• • •

A. Yes. We did it in a variety of ways. That is, at the time children entered care, we sought to establish how parents felt about agencies and what they thought about placement and how they saw agencies with regard to child care.

We followed this up at the two later points. Then, after children had been in care a while, we asked them how they felt their children were being cared for. • • •

• • •

[27] A. The findings on the attitude questionnaire were that mothers and fathers agreed substantially that they saw agencies as facilitators of care. There were [28]

Excerpts from Deposition of Shirley Jenkins

small groups who said that the agencies were trying to take away the children, they were angry about that; and a very small group that said they wouldn't mind turning over children to agencies.

The vast majority of the parents said that agencies are good because they can help you out when you have trouble, they can help a child until he behaves better and is ready to come home; they can do things for a mother when she is not able to do them herself.

But overwhelmingly it was a temporary thing that they would help out. * * * parents expected [29] the children to come home.

Q. Professor Jenkins, the term "filial deprivation," could you explain that term? A. Yes. I coined that term to mean the experiences and reactions of parents when they are deprived of their children. In a sense it is a counter to the very popular concept of maternal deprivation.

Bowlby, who studied children in institutions, developed the idea that children suffer when they are deprived of maternal care. No one has looked at what happens to parents when children are removed. I felt that this was an important part of the total picture of family life.

* * *

[30] Q. What did you look to in the parents to measure what you call "filial deprivation"?

Ms. Lowry: Objection as to form.

A. We tried, in a very straightforward way, to ask parents how they felt when their children went into care. We tabulated and analyzed the feelings of mothers and fathers.

* * *

Excerpts from Deposition of Shirley Jenkins

[31] A. We found 87 percent of mothers, 90 percent of fathers saying they felt sad—and I won't read all the figures—but the majority of the mothers and fathers felt worried, nervous, empty and angry.

* * *

* * * this feeling was not a unidimensional thing so that you could feel sad, empty, angry, guilty, nervous, all at the same time.

* * *

[39] However, I also studied the feelings of parents when children were discharged from care. And here we found a complete reversal. 83 percent—

Just to go back, I questioned 110 mothers as to how they felt when their children were discharged from care. 83 percent said they were thankful, 68 percent said they were relieved. So those were strong expressions of feelings on discharge, thankfulness and relief.

* * *

[40] Q. You mentioned, Doctor, on direct [41] examination, that the overwhelming proportion of parents that you interviewed, viewed agencies as facilitators. A. Yes.

Q. Do you think, Doctor, that such an overwhelming view would persist if it was not anticipated that the child would be returned, or if there was doubt that the child would be returned, if you know?

* * *

A. No, I do not think that they would see agencies as facilitators if they did not see the—because essentially those questions were on the assumption that the child

Excerpts from Deposition of Shirley Jenkins

would be returned, that that was a temporary intervention in time of trouble or until a child behaves better. So that would not be my hypothesis.

• • •

[42] A. When we asked parents how they experienced the agency placement, we had many, many interviews. From the things that parents said, I would think that they looked most favorably on those agencies which they see worked toward the return of the child.

For example, parents have talked about experiences in agencies and the problems of getting the child back, and gave a negative view on situations where it is not easy to have your child returned.

• • •

[54] The problems of children cannot be isolated from their families, and I don't think the best interests of children are in conflict with the families, with their own biological families.

Granted, there are exceptions and times when a state must intervene. By and large, the best advocate for any child, in my view, is his or her mother and father.

• • •

[70] Q. What percentage of the families that you started out with, 390 families, were you able to follow up with throughout the entire study?

• • •

[71] A. Yes, the total number, 390, were interviewed at the first time. The total number that were interviewed five years later were 160.

• • •

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

Q. Do you have any information about how many children had returned home at the end of five years, with regard to 230 families, which is the difference between the 160 and 390? A. No, that information, I assume could be gotten from the Fanshel data on discharge. He focused on discharge questions, we did not. • • •

• • •

[75] We were concerned with personal reactions. We decided to do our final analysis just for the 160 mothers that we had seen in the beginning and later, but we did reach 257 families.

• • •

[4] EUGENE A. WEINSTEIN, PH.D., called as a witness, having been first duly sworn by John D'Alessandro, a Notary Public of the State of New York, was examined and testified as follows:

Examination by Miss Gans:

Q. What is your name? A. Eugene A. Weinstein, Department of Sociology, State University of New York at Stony Brook.

Q. Dr. Weinstein, what is your position in the Sociology Department at Stony Brook? A. I am professor of sociology and former chairman of the department.

Q. How long have you been at the university? A. Since 1968.

• • •

Q. Was your training also in social psychology? A. Yes, it was part of the training in sociology.

• • •

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

[5] A. Social psychology is an area of both psychology and sociology and people from both disciplines work in social psychology.

Q. Have you held any fellowships? A. Yes. I was Social Science Research Council Fellow and Russell Sage Foundation, Post-doctorate Fellow.

Q. Have you written any books? A. Yes. I have published two books, *The Self-Image of the Foster Child*,* and another *Independent Adoptions*, jointly with Helen Witmer and others.

Q. Have you published any articles? A. I published about three dozen articles dealing with various topics in social psychology including social psychology of child development and foster children.

• * •

[8] *Examination by Miss Lowry:*

Q. When did you do this research in foster care? A. I did it in 1955.

Q. Have you had any contact with the foster—any foster care system of foster children subsequent to that? A. Subsequent to '55 I had contact with adoptive agencies and adoptive children, yes.

• * •

[10] Q. Can you describe your study, *The Self-Image of the Foster Child*? A. Yes. I was interested in finding out the impact that this extremely complex and unusual situation had on foster children. The impact of

* R-91 Weinstein 3/18/75 Exhibit A.

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

the situation in which children were confronted by three sets of adults; their biological parents, the foster parents and representatives of the social agency, each of them had responsibility for their care.

I was interested in finding out how children saw themselves in this kind of complex situation and what relationship, how they saw themselves and their experiences in the placement situation and to how they were developing in foster placement.

Q. Were the children you studied in foster care for a year or more? A. Yes. They were all at least five years of age or older and they all had been in placement for at least a year or more.

• * •

[11] A. Well, some children identified with their foster— with their foster parent, some children identified with their parents, their regular biological parents, depending upon conditions characterizing the placement situation and so on.

Q. Could you describe the variables? A. Yes. The chief variable was whether or not the parents visited regularly. If the parents visited regularly, then the children tended to identify with the parents. When they did not, when the parents did [12] not stay in the situation, they tended to identify with the foster parents—but it depended upon the visiting parents.

Only in a few cases did it occur that foster children identified with their foster parents when there was also some contact being maintained with the natural parents, regular contact being maintained with the natural parents.

In those cases—in those cases it depended upon the relative proportion of the child's life that he spent in

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

foster care as to whether he would identify with his foster parents or not.

All of them, I point out that all of the findings that I am describing here meet statistical criteria for reliable findings, that is, that it is extremely unlikely that they could have occurred by chance alone.

• * •

[15] Only in cases where the child spent half of his time, life in foster care, did foster children identify with their foster parents when their natural parents remained in the picture.

Q. In your study, was there a difference in the level of adjustment or development of the children who identified with their natural parents and those who didn't? A. Yes. Children who identified with their natural parents on the average were seen as doing much better, as having higher levels of well-being than children who identified with their foster parents.

• * •

[17] Q. Is identification, is the way you use the term "identification," is that related to the term "emotional bond"? A. Yes, quite clearly.

It relates to who the child sees as loving him, who the child feels love for. Yes, very much so.

• * •

[19] Natural parents are important to foster children when they have formed a prior relationship with them.

I have had over and over and over and over again cases of children who would defend to me the reasons for their being in foster care, express their expectation that of

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

course they would return home—even children who had had been in placement over half their lives who identified with their biological parents in the sense of seeing them as the people or person who they felt was most closely attached to them psychologically, emotionally, and [20] they felt most emotionally attached to themselves.

If you talk to the children themselves, get any sense from the children themselves, it emerges very clearly that this is something very important to them.

Q. On the basis of your study, would you say that the fact that a child has lived with a particular foster parent for a year is in any way determinative of the attachment or identifications of that child with the foster parent or with its own parent? A. The evidence of my study would contradict any conclusion that the attachment of a child to its natural parents is dissolved or replaced by attachment to foster parents after a year's stay in foster care.

• * •

[22] A. My data would imply that the costs to a child of being pushed to abandon its relationship with its natural parents or the failure to take advantage of opportunities to return the child to its natural parents when the child has an attachment to them would be riskier than leaving them in a foster home automatically by virtue of the fact that he has spent one year in that home.

Q. On the basis of your study and experience, what are the reasons to account for the tendency you found for children to continue to identify with their biological parents when in foster care?

• * •

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

There are two lines of theoretical argument that would make such findings understandable to us; one is importance in Freudian theory of early attachments [23] and the tendency for these to persist, but there is also another more social psychological as opposed to clinical reason for this—biological parenthood is of value in our society. Children in foster care are quite aware of the fact that they are different and that difference is something that is devalued. Children come to learn that being with one's biological parents is an important aspect of identity something that they take on as ordinary members of society. I mean it is a stigma for them.

They often have a visible sign of the stigma, of the difference between their last name and the last name of the people with whom they live.

Q. Dr. Weinstein in your book *THE SELF-IMAGE OF THE FOSTER CHILD*, you speak of the placement situation as a social system.

Could you please explain what you mean by that? A. By that I mean that foster care is a complex network of relationships. The child, the agency, foster parents, biological parents, and that these relationships are interconnected so that what occurs in one pair in the set has reverberations for other relationships in the network, what occurs between the [24] agency and foster parent which may affect the natural parent, the child. That is essentially what I mean by social system as over and against isolated parent-child relationship or two, competing isolated parent-child relationships.

• * •

[27] Q. Doctor, in your opinion, what would be the consequence of changing the foster care system by giving

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

foster parents automatic standing to keep—to try to keep the child after one year? A. The threat of possible legal action and the possibility of that, placing a child in foster care would lead to the loss of one's child will undermine one aspect of the ideal or the kind of model foster care system that I have talked about.

This means that parents of foster children, most of whom are poor, will face the possibility of legal action to recover their children which will put them in a very difficult kind of situation.

There is this possible consequence.

[28] There is another possible consequence and that is a consequence for people who become foster parents. This is the danger that the foster care system would be undermined and converted into a kind of a semi-adoption system as the need for adoptable children, the pressure for adoptable children grows and grows and grows with abortion and contraception decreasing the supply of available children.

So that such a practice could become in fact a means for taking children from poor parents and providing some of the relief from pressures for adoptable children, which is not what the foster care system was intended to provide at all.

It also is likely to lead to an increase in long-term foster care which is not a good situation for children.

Q. Could you explain why you don't believe that foster—long-term foster care is a good situation for children?

• * •

[29] A. Because it perpetuates what is essentially an ambiguous situation and one in which there is not protection for another kind of right, that is, a long-term foster

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

placement can be terminated at the will of the foster parents.

This is not the case for natural or easily the case for natural or adoptive parenthood, so that the ordinary protection of adoption and natural parents are not available to a child in long-term foster care. It is an ambiguous situation in which—well, just an ambiguous situation which is apt to have deleterious consequences.

• * •

[38] Q. Do you have any information how many of these 61 children had been in more than one foster care setting of any sort during the time they were in placement, including other foster home or any kind of congregate foster care facility? A. Yes, • • •

Q. When you examined for identification with regard to whether the child identified with the natural parent or the foster parent, did you control for the variable of whether the child had been in multiple foster care settings? A. There was no relationship between multiple foster—being in multiple foster care settings and pattern of identification; • • •

• * •

[39] Q. Is it your testimony that if a child had been in one foster care setting for the entire period of placement there was no greater identification with the foster parent than if the child had been in a number of foster care settings? A. That is right; if the natural parents visited.

Q. What about if the natural parents did not visit? A. Then who the child identified with depended upon the proportion of his lifetime that he had spent in his current foster home.

Excerpts from Deposition of Eugene A. Weinstein, P.H.D.

[46] Q. I asked whether there was a emotionally significant relationship with the foster parents. A. Yes, if the child had spent a significant portion of his life in the foster home.

Q. You testified that you thought it would not be good for children if there were a right in foster parents to a hearing after a one-year period; is that correct? A. Yes.

Q. Do you believe that to be true, both in the instances in which a child's—a child is to be moved to a foster home to return to a natural parent and in the instances in which a child is to be moved from the foster home to another foster care setting? A. I think these are very much different situations.

• • •

[48] Q. Dr. Weinstein, do you think that continuity is important in a child's life? [50] A. In general, there are lots of benefits that children get from continuity in many areas of their lives.

• • •

Would it be important not to interrupt the natural family relationship if it were in any way avoidable?

• • •

I think it important not to interrupt relationships in which children formed deep attachments.

• • •

Excerpts from Deposition of Robert Catalano

[4] ROBERT CATALANO, called as a witness, having been first duly sworn by the Reporter, was examined and testified as follows:

By Mr. Kantor:

• • •

Q. By whom are you employed, Mr. Catalano? A. State of New York, Department of Social Services.

Q. In what capacity? A. Research Analyst.

• • •

[10] *By Mr. Bienstock:*

Q. Mr. Catalano, the conclusions reached in this report, State's April 14, 1975 Exhibit B, they are your own, are they? A. I tried not to reach any conclusions; I just wanted to present what we had there and write a little analysis of it.

Q. The analysis is your own? A. Pretty much. It all gets pretty heavily edited.

• • •

[15] *By Ms. Gans:*

Q. Mr. Catalano, what training do you have? A. Formal training?

Mr. Bienstock: Did you go to college?

The Witness: Four years of college; I was a mathematics major.

By Ms. Gans:

Q. Do you have any other training? A. No, I do not.

Excerpts from Deposition of Robert Catalano

[16] Q. I would like to ask you some questions about Exhibit B. That is, specifically page 1 of the highlights, you said abandonment and neglect are the most prominent conditions in foster care. A. That is right.


Q. With respect to Chart 1,* I would like to show you dependent and neglected. Could you read back the breakdown of those cases?

Mr. Bienstock: Objection as to form. Document speaks for itself.

* At p. 117a.

Excerpts from Deposition of Robert Catalano

*EXHIBIT B—CHART 1

(Opposite) 

* From Exhibit B:

HIGHLIGHTS

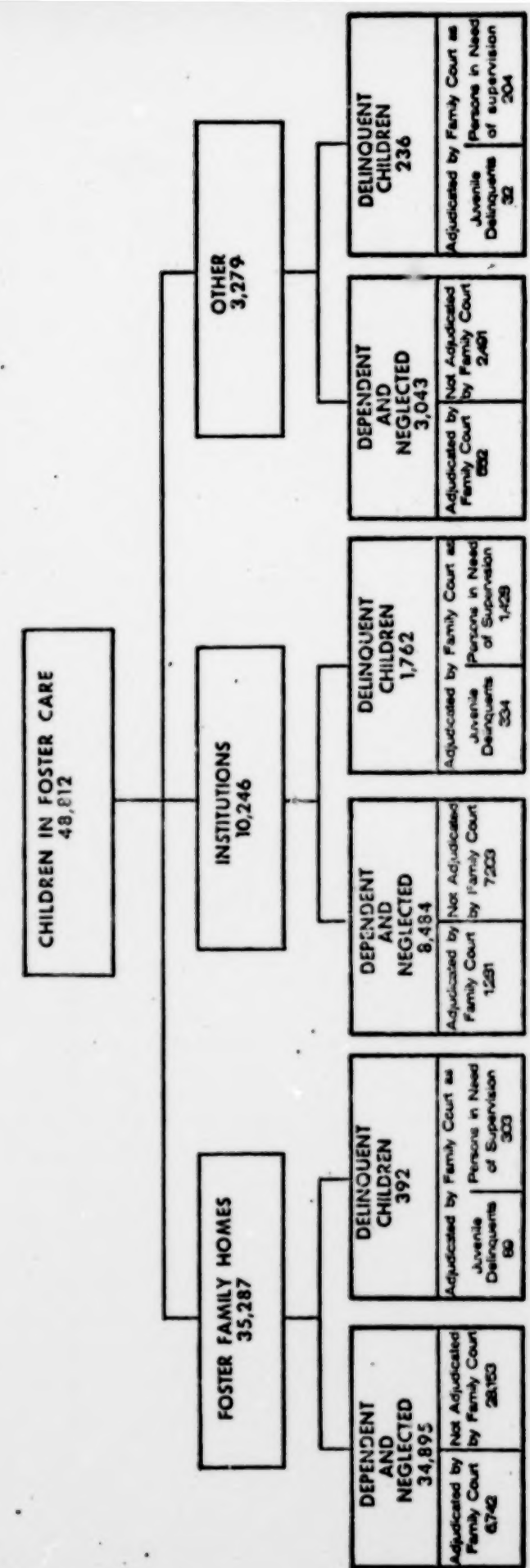
"Abandonment and neglect are the most common conditions prompting admission to foster care; children admitted because of these reasons remain in care longest."

"... The median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.38 years. This compared with 3.63 years for those admitted because of special problems and 2.93 years for children receiving "temporary" care. Among those leaving foster care fastest are unwed mothers, juvenile delinquents and persons in need of supervision (PINS), with 68, 64 and 48 percent of these children, respectively, having been in care less than one full year as of the end of 1973. ..."

"A comparison of caseloads reveals that children admitted to foster care for any reason were inclined to remain in care longer in New York City than children admitted for the same reason Upstate."

CHART 1

CHILDREN IN FOSTER CARE UNDER THE SUPERVISION
OF THE NYS BOARD OF SOCIAL WELFARE AND THE NYS DEPARTMENT OF SOCIAL SERVICES
DECEMBER 31, 1973



NOTE: At the end of 1973 there were, in addition to those enumerated above, 6,155 delinquent children in the New York State Training School System supervised by the New York State Division for Youth. These children, along with those in institutions providing temporary or special services such as schools for the deaf, convalescent homes and temporary shelters, are excluded from this report.

117a

Excerpts from Deposition of Robert Catalano

Ms. Gans: Since I would like to ask some questions about the category, I think it makes sense to get it on the record.

Mr. Bienstock: The document is in the record; that is exactly the point.

By Ms. Gans:

Q. Mr. Catalano, isn't it a fact that the category "dependent and neglected children" is broken down into cases adjudicated by the Family Court and those [17] not adjudicated by the Family Court? A. That is correct.

Q. And in the category "not adjudicated by the Family Court", does that mean there has been any adjudication of abandonment or neglect?

• • •

The Witness: We are just using the general terms as opposed to PINS and JD's as how we generally use them and—

By Ms. Gans:

Q. Are you familiar with the category called voluntary foster care placements? A. I have heard the term.

Q. Does that involve an adjudication, to your knowledge? [18] A. No, the term "voluntary" is not involving the courts.

Q. All right. Is it true that your reference to abandonment and neglect is the common reference, in fact, to the category dependent and neglected? A. Right.

Q. Yes, but in fact there have been no adjudications for 28,153 children out of 34,895 in the category? A.

Excerpts from Deposition of Robert Catalano
Excerpts from Deposition of Dr. Stella Chess

Among the 34,895 dependent neglected in foster family homes, 28,153 were not adjudicated.

Q. Do you use the term abandoned, dependent and neglected interchangeably? A. In some cases.

Q. But when you do that, you do not, in fact, know whether abandonment, neglect or dependency was involved? A. In legal terms?

Q. Yes. A. I do not.

• • •

560 First Avenue
 New York, New York
 April 7, 1975
 11:30 A.M.

DEPOSITION of DR. STELLA CHESSE, held at the above place and time, before a Notary Public of the State of New York.

[2] DR. STELLA CHESSE, called as a witness, having first been duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

Examination by Ms. Lowry:

• • •

[4] Q. Have you written any books or articles in your area? A. It is just as easy to get a CV, because I have written a lot. I have written An Introduction to Child Psychiatry, Psychiatric Consequences of Congenital Rubella, Behavioral Individuality in Early Childhood, Temperament and Behavior Disorders, and How to Help Your Child Get The Most Out of School.

Excerpts from Deposition of Dr. Stella Chess

I think that's the books. And I have been co-editor of a series called, Annual Progress in Child Development, Child Psychiatry, of which there have been eight volumes.

• * •

[5] Q. What is your present position? A. Professor of Child Psychiatry at New York University Medical Center.

• * •

[12] Q. Dr. Chess, do you have any estimate on the number of children you have evaluated and/or treated during your professional career? A. I do have the number in a paper I just wrote, because I reviewed all the kids.

I think it's something like 5,000.

• * •

Q. Were any of these children, children who were in any kind of a foster care setting? A. Yes.

• * •

[17] Q. What affect does the existence of blood ties alone have on the development of the emotional attachment? A. There is no automatic relationship between blood ties and functioning.

Now there may be people who would only give affection to a child to whom they have a blood tie. In that case, it would have a secondary affect.

As far as the child is concerned, he is responding to what in fact happens.

• * •

[19] Have you had any experiences observing foster parents and foster children in which there has been a significant emotional relationship between the foster parent and foster child?

• * •

Excerpts from Deposition of Dr. Stella Chess

A. Yes.

• * •

[20] Q. So it would be possible in your professional opinion for there to be, depending on the individual circumstances of the child and the relationship and the child's history and all of the variables that you have referred to, it would be possible for there to be a [21] significant and emotional attachment in a foster parent-foster child as in a biological parent-biological child? A. Yes.

And the adverse.

Q. Is it possible for there to be an absence of significant emotional attachment between a child and the child's biological parent?

• * •

A. Certainly there can. Certainly there can, if you have a parent who is psychiatrically ill and incapable of making an emotional attachment, you would have, you know, you would have an absence of one, and the other thing would be if they hadn't been in touch with each other, I mean if they just had—if the child hadn't been in the care of the biological parent, that person would be a stranger, there would be no relationship. These would be the [22] main circumstances.

Q. Are you familiar with the term "psychological parent"? A. Yes.

Q. And can you briefly explain what your understanding of that term is, "psychological parent"? A. The term refers to there being an attachment between child and adult taking care of the child as a parent-child relationship, and that this has been developed over a period of time, all the things that I discussed before, you know, in

Excerpts from Deposition of Dr. Stella Chess

terms of development of ties having occurred between that particular child and that particular adult.

Q. In your opinion, can this relationship develop in the absence of a blood relationship? A. Yes.

• * •

[23] Q. Would the passage of time be likely to strengthen this relationship?

• * •

A. If it is a good one, yes.

Again, it depends on the nature of the relationship. It could be the opposite.

Q. What effect, in your professional opinion, would it be likely to have on a child to remove him from adults with whom he has formed a psychological relationship, a positive psychological relationship? A. We are talking about immediate effect or long-term effect?

Q. Both. A. Both. The immediate effect would be distress, I mean, if you take a child away from the people who are his bonds, you would [24] have immediately distress.

The long-term effect is where all the things I said before also pertain. It would depend on what was the nature of the circumstance to which the child went, whether this were the first such separation or not, that is, if the child were repeatedly taken from the people to whom he had developed bonds and removed and then back again.

• * •

I would tend to say that there ought to be a very good reason for doing it before such a thing is done. Such a thing should not be done lightly and basically a child who

Excerpts from Deposition of Dr. Stella Chess

is a normal, healthy child and had proven himself capable of forming attachments to one set of parents might in the long run be able to develop equally strong attachments to another set of parents as long as this hadn't been a repeated thing.

On the other hand, it could be utter disaster depending on the nature of the new [25] living set of circumstances and whether the new parents' handling was consonant with the child's needs or not, or whether this was one in a series of removals in which the impermanence was more dominant than the question of the details of what went on between the child and parent.

Q. What impact would a series of removals be likely to have on the child's development? A. Again the details do indeed depend on the age of the child but a series of removals are highly likely to interfere with the child's ability to learn a degree of predictability, to develop a sense of expectation of what behaviors are approved of and what behaviors are disapproved of, to learn a sense of security of expecting that if he behaves in a certain way he will get positive feedback in a sense.

Repeated removal of a child from one situation to another, even if they are basically good situations, you know, other than the fact that they are different, if they are repeated they are highly likely to deprive the child of an ability to form close relationships • • •

• * •

[26] Ms. Gans: • • • Neutral foster homes are not an issue in this case.

Ms. Lowry:

Q. In terms of a child's development, do you have any opinion on the use of so-called neutral foster homes to

Excerpts from Deposition of Dr. Stella Chess

which a child may be removed after he has formed a strong attachment with foster parents?

• * •

[27] Q. Do you have an opinion of the effect on the child of removing him from a foster home in which he has formed strong emotional ties to a neutral foster home?

A. I don't think it's a good idea. If a child is going to be removed, it means into a void, an emotional void.

It is equivalent to somehow communicating to him that emotional ties are not proper, and that's antithetic to what we want children to learn.

• * •

[28] Q. Do you think children are capable of forming judgments about where they want to live?

• * •

A. Some children are and some aren't.

Q. With regard to a child who is capable of forming, in your opinion, who is capable of forming a judgment as to where they want to live, how important is it to consider the child's opinion in a decision with regard to where the child should live?

• * •

A. I would listen very carefully but I wouldn't automatically act on it. I mean, again it is a situation where you have to evaluate the total circumstances and the child cannot be expected to be aware of the totality of the circumstances, so that his [29] reaction is bound to

Excerpts from Deposition of Dr. Stella Chess

be on the basis of only that segment of experience that he has been through.

• * •

Q. Do you have an opinion as to whether a decision to remove the child from a foster home in which the child has been living should be reviewed prior to the actual removal of the child or subsequent to the removal of the child with regard to the effect of such a move on the child? A. It seems to me that it should be reviewed beforehand because any removal should be carefully thought out and be to a new place which is going to be the permanent place, if at all possible.

• * •

[31] Q. Would the initial removal, in your opinion, be likely to cause some damage to the child even if the child were later returned? A. It has a probability. I wouldn't, you know, in some cases it might be made up, but it has enough of a probability, so I don't think it should be done lightly.

Q. Based on a child's psychological development, how important in your opinion is it to have the decision to remove a child from a foster home carefully made? A. Very important. Very important. It [32] should be a primary tenet of our principal people who have children's lives in their responsibility.

• * •

Ms. Gans: • • • The word "carefully" is vague.

Q. Are you familiar with the book, *Beyond the Best Interests of the Child*? A. I just read it.

• * •

Excerpts from Deposition of Dr. Stella Chess

Q. Which, if any, of the conclusions, do you agree with?

A. I agree with the importance given to the psychological parent as a factor to be taken into account.

You want me just to stick to the ones I agree with, not the disagreements, at this moment?

Q. Yes. A. I agree with the conclusions that children should not be repeatedly removed from one place to another place to another place.

I think those are the two main conclusions [33] that I would agree with. . . .

Q. On what do you base your agreement with these conclusions? A. On both the theory and the observation that children do develop their sense of identity, their sense of conscience, their sense of ability to develop meaningful relationships by consistent experiences with the same group of people, small group of people, and in that sense what they discuss there is in agreement with what I have both learned and seen to be the case.

Q. Generally what conclusions in the book do you disagree with? A. I think that it is a too unidimensional statement to say whoever is at any given moment the child's psychological parent should remain so. It doesn't give credence to all the other factors that might be involved in one given child's case, and I think that there may be situations when it is simply not the best thing for the child.

. . .

[34] There is also more minor disagreement, but I suppose the part that there isn't enough weight given in the discussion to the variation in children's adaptive capacities.

. . .

Excerpts from Deposition of Dr. Stella Chess

[40] Doctor, is it possible for a child to simultaneously have a psychological parent-child relationship with more than one set of [41] parents?

. . .

A. . . . It is possible for children to develop strong psychological ties to, I think, more than one set of parents, depending on a whole set of circumstances.

Q. What circumstances would it depend upon? A. On whether each one reinforced the other, each set of parents reinforced the tie with the other.

. . .

I have seen this where it has happened where the foster parents continually spoke of, in this case it was the mother, with great [42] affection and made sure that the child didn't feel that the mother had abandoned it. . . .

. . .

[59] A. Initial decisions can be wrong because they can fail to take into account certain, you know, totality of facts which sometimes come out in later discussion.

I would say again that I don't really think it is right to dislodge a child until it is very certain that the place to which he is to go is to be the place that is to be permanent.

. . .

[64] *Ms. Gans:*

Q. . . . could you predict just from the fact of a child and the fact that foster parents are licensed to be foster parents—

. . .

Excerpts from Deposition of Dr. Stella Chess

Q. —that an emotional tie will develop? A. No, that wouldn't be enough.

Q. Could you predict if a child is in a foster home for a year, again discounting all the other factors, that you could predict [65] that there is an emotional tie between that child and the foster parent? A. You say discounting all the emotional factors?

Q. That's right.

* * *

A. If you are discounting that, then I would say a year should certainly be enough to predictably develop an emotional tie, but, as I said, there could be exceptions.

There could be children for whom, because of their previous experience, it would take more than a year for the emotional tie really to be solidified.

* * *

[66] Q. Could you predict that solely on the basis of the fact that the child has been in that foster home for a year that that is the more important relationship than the child's relationship with its parents?

* * *

A. No.

* * *

Q. In general, would you worry about [67] children going home to their family after a year?

Ms. Lowry: The witness has already testified she can't answer that question.

A. It would depend on what home was like, how permanent this was to be, whether the factors that led to the

Excerpts from Deposition of Dr Stella Chess

original placement are likely to recur, whether there was a positive relationship between the child and the parent before the, you know.

* * *

[72] Q. If a child is in foster care, understanding, as you said earlier, that it is a temporary situation and that he will go home, is prolonging its return a disruption of expectations?

* * *

A. If this is a child whose tie to his home has been maintained and the parents want him back and he wants to go back, certainly under these circumstances, to prolong the separation would make it hard on the child.

* * *

Q. In this lawsuit, I believe it was Dr. Goldstein who testified that, correct me if I am wrong, in a child under six years of age, [73] a separation from its own parents of six months was enough to undermine the child's own relationship with its own parents and replace that with an attachment to the foster parents.

* * *

[74] A. No, I don't think one could automatically predict that this would be the case.

Q. In your opinion, can a child who has established an attachment to his own parents, assuming there is continued contact, maintain the relationship with its own parents, maintain the attachment to its own parents for more than eighteen months in foster care?

* * *

Excerpts from Deposition of Dr. Stella Chess

[75] A. You don't duplicate in a visit the routines of what goes on in life, but the ties certainly can be maintained.

* * *

[76] Q. Is the question of the effect of separation on a child a matter on which child psychiatrists agree or scientists agree, or is this a subject of controversy?

* * *

A. * * * There is a considerable degree of controversy on that.

* * *

[84] A. * * * [Y]ou can't just say the word "separation" and immediately know that without having defined all the rest of the circumstances that you are creating havoc.

* * *

[85] Q. Is it also possible for a child not to have a meaningful relationship with a foster parent?

* * *

A. A perfectly normal child might go into a foster home and, for reasons of the way in which the foster parent cared for the child, refrained from making an emotional bond, the child might very well, might not form an emotional bond, and it might be a bad foster (86) home, in which case the child might form a rather negative attitude and not form an emotional bond.

* * *

Appearances

84 Fifth Avenue
New York, New York

April 9, 1975,
3:00 P.M.

EXAMINATION of the Defendants, by MARY JANE BRENNAN, taken pursuant to Notice dated March 27, 1975, before a notary public of the State of New York.

[2] *Appearances:*

NEW YORK CIVIL LIBERTIES UNION
Attorneys for Plaintiff Foster Parents,
84 Fifth Avenue,
New York, New York 10011
By: PETER BIENSTOCK, Staff Counsel.

COUNTY ATTORNEY OF NASSAU COUNTY,
Nassau County Executive Building,
West Street,
Mineola, New York 11501
By: JACK OLCHIN,
Deputy County Attorney

LOUIS J. LEFKOWITZ, Esq.,
Attorney General
2 World Trade Center,
New York, New York 10049
By: STANLEY KANTOR,
Assistant Attorney General

MARTIE LOUIS THOMPSON, Esq.,
Community Action for Legal Services, Inc.,
335 Broadway,
New York, New York 10013
By: Ms. LOUISE GRUNER GANS, of Counsel.

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

MARY JANE BRENNAN, having been duly sworn by a notary public of the State of New York, testified as follows:

Direct examination by Mr. Bienstock:

• • •

[4] Q. Within your agency, who makes the decisions to remove children from particular foster homes?

• • •

[5] A. • • • So, there would be at least two levels of administration involved in that. If the child were to be removed from a foster home and the foster parents were not in agreement with this, then they would be given every consideration according to the state guidelines which we observe and there would be a hearing at their request and at the hearing the assistant director would preside.

• • •

[6] Q. What are the minimum educational requirements for the first level, the case worker? A. Bachelor's Degree from an accredited college.

Q. Is there any particular subject in which the Bachelors Degree is required to be? A. I do not believe so.

• • •

[11] Q. I would like to ask you some questions about the decision to remove children from particular foster homes.

What standards govern the decision to remove a child from a particular foster home?

• • •

A. Well, there are a number of factors that are taken into consideration. First and foremost, most of the children who are in placement in our department under the auspices of our department are placed with us voluntarily by their parents. We operate under the laws of

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

New York City and the mandates of the State Department of Social Services. Therefore, if a child has been voluntarily placed and if the parent is requesting that place for the return of the child to him or her, to them, unless there was strong compelling evidence that that child should not be returned, we would work with the parent and the foster parent and the child towards the return of the child home.

[12] • • • then our goal will be to return that child to his own family just as quickly and efficiently and sensitively as possible and the parent will understand this, the foster parent and the child.

• • •

Q. When a child is moved from a particular foster home to another foster home or to an institution, what are the standards that govern that decision? A. Well, there is often one very simple one and that is the foster parents insistence that [13] the child leave the foster home. That is one of the major reasons why children go from one foster home to another.

Another reason can be if the child is having—not having his needs properly met in the foster home, if he is not developing properly, if he is not being fed properly, if there is difficulty or problems, that sort of thing.

Another would be if the child has been harmed or abused, there are complaint problems in relation to that.

Q. In the foster home? A. In the foster home, right.

• • •

[17] Q. When your agency decides to remove a child from a particular foster home, how is that decision communicated to the foster parent? A. It is usually communicated to the foster parent verbally by the worker for

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

the child who is visiting in their home on a regular basis. In other words, in terms of our goals to effect permanent plans for all of these children, the foster parents are very much a part and a partner in this.

Q. Is the decision usually also communicated to the foster parent in writing? A. In conformance and in compliance with the state's mandates, they are. * * *

* * *

[19] Q. Are the reasons for the removal of the child from a particular foster home communicated to the parents in writing? A. To the foster parents?

Q. Yes. A. I do not believe so. They certainly would have been discussed, however, * * *

* * *

[20] Q. If the foster parents do not agree with your agency's decision to remove the child, what recourse do they have? A. They have the recourse that is provided in the mandates of the law and as we see from this, the form, the notice of removal or agreement to remove child form, they can indicate in writing that they agree to it and they waive their right to notification or that they have read it and they request a conference with a social service official prior to the proposed [21] removal.

* * *

[23] A. Of my knowledge, the assistant director related to the situation is the person with whom the foster parents have the conference. If the foster parents request that the supervisor and the worker be present or that they not be present, their wishes are honored.

* * *

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

[29] Q. Are they told prior to the conference, Miss Brennan, on what basis the assistant director who makes the decision after the conference will make the decision?

A. I don't really know if I can answer that. That the hearing is one of the steps in this and the purpose of the hearing is to hear what the foster parent has to say and any information that is developed there that maybe is new or different or whatever is what would be taken into consideration.

* * *

[30] A. The functions of the conference is to give the foster parents every opportunity to present their views and reasons as to why they disagree with the agency's decision to remove the child and I would like to add also since it would not come to that point, if both the foster parents and the agency were in agreement, it would be a further opportunity for the department to interpret to the foster parents why the department had made that plan.

Q. By interpret, do you also mean explain? A. Yes. I think you can say that.

* * *

[31] Q. If the person holding the conference—very often isn't it true that the person holding the conference is the person who has made the decision?

* * *

A. The person holding the conference has most definitely participated in the decision.

* * *

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

[32] Q. It is not an unusual practice for a supervisor to discuss the facts of a particular case with an assistant director prior to the conference, is it?

• • •

A. It is not.

[35] Q. What is your agency practice with regard to permitting foster parents to view agency records prior to the conference? A. It is not our practice to have anyone review our case records unless they have been subpoenaed or unless they should fall under the Freedom of Information Act.

• • •

[36] Q. Where a decision is made in whole or in part based on agency records, the answer would be the same? They are still not permitted to view the agency records; is that right? A. I would suspect so.

Q. • • • Could you describe what goes on at a conference, the procedure, who starts, who explains first, who answers, in as much detail as you can? A. I really couldn't because I have never been present during one of those conferences.

Mr. Kantor: On the basis of that answer I move to strike the entire deposition that occurred after the individual was identified as Bureau Chief of the Children's Bureau of the Nassau County Department of Social Services.

Ms. Gans: I join in the objection.

• • •

[39] Q. Are the standards for the decision both the same before the conference and after the conference? A. Yes.

Mary Jane Brennan—for Plaintiff Foster Parents—Direct

Q. Are those standards in writing anywhere? A. I would think not.

• • •

[41] Q. Are the reasons for the decision stated in writing when the decision is communicated in writing? A. I do not believe the reasons for the decision are listed.

Mr. Kantor: Again I move to strike so much of the answer as it is based on belief.

Ms. Gans: I join in the objection.

• • •

Q. How long have you been in your present position? A. About nine months.

• • •

[88] A. Does the worker use the record in making a decision to remove a child?

Q. That's right. A. The decision to remove a child is not made by the worker alone, number one. A worker's activities regarding a case are recorded in the case record. A worker should review the record. The supervisor reviews the record, the assistant directors review the record in addition to verbal exchanges among those parties.

• • •

[89] Q. Do you sometimes return a child home where there has been no contact between the mother and child? A. I think that would be very unlikely that there would have been no contact. As I mentioned earlier, we make a very zealous effort to involve all parties to this in the implementation of this plan.

• • •

Plaintiff's Exhibit 1

CHILDREN'S BUREAU
County Seat Drive, Mineola, New York 11501

Charles A. Langdon
Executive Director

Mary Jane Brennan
Administrative Director

AGREEMENT TO REMOVE CHILD FROM FOSTER FAMILY CARE

June 26, 1974

Name of Child: Cheryl Wallace

Date of Birth: 9/14/62

Name of Foster Parents: George and Dorothy Lhotan

Address: 10 Vassar Lane, Hicksville, N. Y.

In accordance with the New York State Department of Social Services (Regulation 450.14), we wish to notify you of the Agency decision to remove Cheryl Wallace, a foster child, from your home. This will serve as the 10-day notification of removal on or after July 9, 1974.

If you are not in agreement with this decision, you have the right to request a conference with a Social Services official to have the proposed removal reviewed. Your request for such conference must be made within five days of receipt of this notice.

• • •

Plaintiff's Exhibit 1

I have read the above and object to the removal and request a conference with a Social Services official prior to proposed removal.

Witness

Foster Father -----

Foster Mother -----

• • •

Appearances

STATE OF NEW YORK
COURT OF CLAIMS [sic]

Organization of Foster Families for
Equality and Reform, et al.,
Plaintiffs

—against—

JAMES E. DUMPSON, et al.,
Defendants

and

NAOMI RODRIGUEZ, et al.,
Intervenor-Defendants

Examination Before Trial of Peter Mullany, held pursuant to Order, in the offices of the New York State Department of Social Services, 1450 Western Avenue, Albany, New York, commencing at 10:00 A.M. on Monday, April 14, 1975, before Deborah M. Sawitzki, Court Reporter in and for the State Of New York.

• * •

Examination Before Trial of Peter Mullany

[4] PETER MULLANY Esq. called as a witness, first having been duly sworn by the Reporter, was examined and testified as follows:

By Mr. Kantor:

• * •

Q. Mr. Mullany, would you tell me by whom you are employed? A. The New York State Department of Social Services.

• • •

Q. And in what capacity are you employed? A. Assistant Counsel.

• • •

Q. Can you tell me what your duties are as Assistant Counsel? A. My duties are to generally supervise the Bureau of Administrative Adjudication which is generally [5] responsible for the scheduling, conducting of fair hearings, and issuance of decision Statewide.

Q. Would those fair hearings that you are responsible for scheduling and conducting include hearings under Section 400 of the Social Services Law? A. They do.

Q. And are you familiar generally with the issues and procedures involved in adjudicating Section 400 fair hearings? A. I am.

• • •

[7] Q. Why do you break out the Section 400 hearings and treat them differently? A. Number one, they tend to be a great deal longer than a regular public assistance hearing. They tend to involve, obviously, different issues than you are going to find in a public assistance fair

Examination Before Trial of Peter Mullany

hearing. They require a more specific expertise than the general public assistance fair hearing does and, for those reasons basically, we handle [8] them separately.

Q. If you know, can you tell me on the average how long a Section 400 fair hearing runs? A. I would have to say, to the best of my knowledge, there is no real average. They tend to either be very, very short or very, very long, and the reason for the difference, I think, is depending at what stage of the case the hearing is held at. For example, if it is a case—and we have them—where from the time the hearing has been requested or even prior to that time, until it has been scheduled a Family Court may intervene and direct placement of the child; for example, return the child to the natural parent. In those types of cases, the hearing itself would not tend to be as long as when there is still a dispute. I could not give you an average elapsed time.

Q. In those instances where there is a dispute, could you give us an average of the length of time the hearing takes? A. The minimum would be one day; very likely more than one day.

[9] Q. Within the past 12 months, if you know, how many Section 400 hearings have been conducted by your bureau?

• • •

Q. To the best of your knowledge? A. This is an estimate: It would be somewhere in the neighborhood from 12 and 20 requested.

Q. And how many, to the best of your knowledge or estimate, are actually held and go to adjudication? A. I would say probably—again this is an estimate—60 to 70 percent of the 12 to 20 estimate.

Examination Before Trial of Peter Mullany

Q. So, I take it, then, it would be somewhere between seven to ten? A. Somewhere in that neighborhood, as a very small number of the total number of cases we have.

• • •

[15] *By Mr. Bienstock:*

Q. Could you tell us, based on your best estimate if you have one, how long a period of time elapses between the request for a fair hearing and the final determination in the 400 fair hearings? A. Limited to 400 fair hearings. That is a very difficult question to answer, and I cannot answer it. There are about six reasons I cannot answer it; one is cases are adjourned. They are adjourned at the request of either party for anywhere from a week to a month, which is going to elongate the period.

Secondly, depending upon the type of hearing involved and its length, obviously, the amount of time the hearing officer is going to be required to prepare his report is going to vary. A four-day hearing with numerous exhibits and documents and necessity of a transcript, et cetera, is going to require the passage of time. I do not know in any given [16] situation what the average is from the date of request to the date of disposition; also, that our ability to hold and issue decisions in this field is colored by the fact we are required to hold the remaining 35-, 36,000 hearings annually within time frames as established by Federal and State regulation and Federal courts.

Q. Generally, is the decision time, meaning time from request to decision in foster care hearings longer or shorter than in public assistance hearings, if you know? A. It is, on an average it is probably longer.

• • •

Examination Before Trial of Peter Mullany

[18] Q. What types of specific issues, based on your fair hearings and the fair hearings that Mr. Buckley has conducted that you have reviewed, are to be resolved or have been resolved at these fair hearings A. Well, you know, it is awfully hard to pinpoint an actual factual issue. Again you are talking about a series of facts which do or do not result in a determination of the agency, a justifiable determination to remove a child. It is not generally one fact. In one case it can be the presence in the family of, you know, another child, a natural child whose interest and whose activities are adversely affecting the foster child. In another case it could be a question of excessive utilization of corporal punishment on a foster child which would justify removal; then, a lot of cases are cases where the actual complaint of the foster parent is not that the child is being removed but that the foster parent has taken such an interest in the child that what he is actually seeking is an adoption preference when the agency does [19] come in and determine to remove the child for adoption by someone else.

The issues generally are not, except for the possible exception of corporal punishment situations, is generally not a question of dispute; in fact, most of the cases, for example, involve cases where the agency has determined to remove the child and return the child to its natural parent who voluntarily had the child placed. In that case, the foster parents are not objecting so much to the removal on the basis of the child going to his natural parent, they are objecting on the basis that they have acquired an affection and love for the child which they feel should justify them in retaining the child. It is not a contest.

• • •

Examination Before Trial of Peter Mullany

[20] *By Ms. Gans:*

Q. I believe you testified that sometimes you have a request for a 400 hearing and then there is an intervening court order concerning the child. A. It has happened on occasion.

Q. At that point you proceed with the hearing? A. We proceed with the hearing.

Q. And what do you see as your authority under those circumstances? A. The authority for the hearing is Section 400 of the Social Services Law which gives to foster parents the right to a hearing.

[21] Q. I see. A. We would generally have no way of knowing until the hearing itself what might have transpired in the interim.

Q. Let us say you do know; do you still feel you have authority to go ahead with the hearing? A. The question, "you"—

Q. "You" as the Assistant Counsel? A. You may have authority to go ahead with the hearing, you may not have authority to be a bona fide remedy for the foster parents. We have no way of knowing, when the foster parents request the hearing, in many cases why they are asking for it, although they are entitled to have a hearing when a child is removed. Foster parents, like everyone else, they do not frame the exact issue that clearly.

Q. I believe you testified that the Commissioner does not have the power to reverse a Family Court decision or a Supreme Court decision. A. Basically, that is correct.

Q. Does that mean that when there is such a decision, the hearing is an exercise, academic exercise? [22] A. The hearing decision, the ones I have seen in the past, where something has happened in the interim, whether it is a placement of some other sort, judicial placement of

Examination Before Trial of Peter Mullany

some other sort, the hearing has resulted in, basically, there being no issue to be decided at that point in time any longer by the fair hearing procedure.

Q. You testified that a number of the fair hearings involved the child being returned to the home; is that correct? A. That is right.

Q. And you also testified that it is not your practice to notify the natural parent? A. That is correct.

• • •

[24] Q. There is no provision in the law, or is there, which gives a hearing officer the power to stay a fair hearing pending, stay a removal of a child from foster care pending a determination of the fair hearing? A. No.

Q. You testified that at times the removal is stayed pending a fair hearing decision, but that is on consent of the agency, isn't it? A. Generally not only on consent of the agency but it is initiated by the agency.

Q. So that if the agency does not wish to stay the removal pending a fair hearing determination, there is nothing that the hearing officer can do about that? A. That is my understanding of the law.

Intervenors' Defendants' Exhibit 2

CURRICULUM VITA

DAVID FANSHEL

Address:

537 Cumberland Avenue
Teaneck, New Jersey 07666
Telephone: (201) 836-9280

Current Employment:

Professor
Columbia University
School of Social Work
622 West 113 Street
New York, New York 10025
Telephone: (212) 280-3250

Personal Data:

Born July 29, 1923, New York, N. Y.
Married, two children
Social Security No. 068-14-1880

Educational Background:

City College of New York, 1947, B.S., Sociology
Columbia University School of Social Work, 1948, M.S.
Social Work

Intervenors' Defendants' Exhibit 2

Columbia University, Department of Sociology, 1948-1955, Completed course requirements for doctoral program (60 credits)

Columbia University School of Social Work, 1960, D.S.W., Social Work Research.

Experience:

1942-1945 Navigator, European Theater, Army Air Force

1945-1948 Part-time experience as group worker in settlement houses, community centers;

Graduate student field placement in New York City Welfare Dept. and Veterans Administration (1 academic year each);

1948-1952 Caseworker, Jewish Child Care Association of New York.

Duties: Worker in residential treatment center and intake department worker in foster care program.

1952-1955 Research Associate, Studies in Gerontology, Cornell University Medical College, New York City.

Duties: Participated in design and execution of large-scale field survey of aged persons in New York City. Subsequently helped design and was administrator of an interdisciplinary counseling service for the aged in East Harlem.

Intervenors' Defendants' Exhibit 2

1955-1958 Research Director, Family and Children's Service, Pittsburgh, Pennsylvania

Duties: Directed studies related to agency practice including investigation of case-workers' perceptions of their clients, Negro couples applying for adoption, families providing foster care for children and couples having marital problems.

1958-1963 Director of Research, Child Welfare League of America, New York, New York.

Duties: In charge of program involving staff of six to eight full or part-time persons. Administrative supervision of research projects and direct work as principal investigator in adoption studies consulted with child welfare agencies in various parts of the country on research problems.

1962-

Present Faculty, Columbia University School of Social Work (Associate Professor, 1962-1965, Professor, 1965-); Director, Child Welfare Research Program (1964-present).

Duties: Time divided between research teaching (courses on research methods in Master's and doctoral program, doctoral dissertation supervision) and directing large-scale program of research on foster care of children in New York City (1964-present).

Intervenors' Defendants' Exhibit 2

Research Projects:

Name	Dates	Source of Support	Selected Publications
1. Studies in Gerontology (Cornell University Medical College)	1952-1955	Russell Sage Foundation	<i>Five Hundred Over Sixty</i> (book)
2. Studies in Agency Practice (Family and Children's Service, Pittsburgh, Pa.)	1955-1958	Heinz Foundation, Pittsburgh, Pa.	<i>A Study in Negro Adoption</i> (monograph); <i>Caseworkers' Perceptions of Their Clients</i> (book)
3. Studies of Foster Parents (Family and Children's Service, Pittsburgh, Pa.)	1957-1960	Field Foundation of Chicago and New York	<i>Foster Parenthood</i> (book)
4. Disturbed Children in Psychiatric Settings (Child Welfare League of America)	1963-1965	American Child Guidance Foundation	<i>Behavioral Characteristics of Children Known to Psychiatric Out-Patient Clinics</i> (monograph)
5. A Follow-Up Study of Adopted Families (Child Welfare League of America)	1962-1966	Mildred E. Bobb Fund of New York	<i>How They Fared in Adoption</i> (book)

Intervenors' Defendants' Exhibit 2

Name	Dates	Source of Support	Selected Publications
6. The Adoption of Indian Children by Caucasian Families (Child Welfare League of America)	1962-1970	Child Welfare Research and Demonstration Grants Program, HEW	<i>Far From the Reservation</i> (book)
7. Study of Advanced Casework Practice (Arthur Lehman Counseling Service, New York City)	1965-present	NIMH	<i>Playback: A Marriage in Jeopardy Examined</i> (book); <i>Therapeutic Discourse</i> (book in preparation)
8. Child Welfare Research Program (Columbia University School of Social Work)	1965-present	Child Welfare Research and Demonstration Grants Program, HEW	<i>Children in Foster Care</i> (book in preparation); <i>Dollars and Sense in the Foster Care of Children</i> (monograph)

SELECTED OTHER PROFESSIONAL ACTIVITIES:

1. Honorary Editor-in-Chief, *Journal of Education for Social Work*, Council on Social Work Education (1966-1972).
2. Chairman, Research Committee, Family Service Association of America (1966-present); member (1958-present).

Intervenors' Defendants' Exhibit 2

3. Member, Research Committee, Child Welfare League of America (1968-present).
4. Chairman, Advisory Board, *Abstracts for Social Workers*, National Association of Social Workers (1965-1969).
5. Chairman, Publications Committee, National Association of Social Workers (1971-present).
6. Chairman, Divisional Committee, National Conference on Social Welfare (1971-1972).
7. Member, Advisory Board, Booz, Allen Public Administrative Services, *Social Services Effectiveness Study* (for HEW) (1971-1972).
8. Member, Interagency Council on Child Welfare, New York City (Committee on Management Information System), (1971-present).
9. Member, Child and Family Development Research Review Committee, Office of Child Development, HEW (1971-present).

PUBLICATIONS

- Fanshel, David; Kutner, Bernard; and Langner, T. "Aging: A Cross-Sectional Survey and Action Program." *Journal of Gerontology*, Vol. 9, No. 2 (April, 1954), pp. 205-209.
- Kutner, Bernard; Fanshel, David; Togo, A.; and Langner, T. *Five Hundred Over Sixty*. New York: Russell Sage Foundation, 1956 (345 pp.).

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- Fanshel, David. *A Study in Negro Adoption*. New York: Child Welfare League of America, 1957 (108 pp.).
- . "A Study of Caseworkers' Perceptions of Their Clients." *Social Casework* (December, 1958), pp. 543-551.
- . *An Overview of One Agency's Casework Operation*. Pittsburgh, Pa.: Family and Children's Service, 1958. (Distributed by Family Service Association of America; 318 pp.)
- Meyer, Henry J.; Borgatta, Edgar F.; and Fanshel, David. "Unwed Mothers' Decisions about Their Babies." *Child Welfare* (February, 1959), pp. 1-6.
- Borgatta, Edgar F.; Fanshel, David; and Meyer, Henry J. *Social Workers' Perceptions of Clients*. New York: Russell Sage Foundation, 1960 (92 pp.).
- Fanshel, David. "Toward More Understanding of Foster Parents." DSW dissertation, New York School of Social Work, Columbia University, 1960.
- . "Studying the Role Performance of Foster Parents." *Social Work* (January, 1961), pp. 74-81.
- . "Specializations Within the Foster Parent Role: A Research Report." *Child Welfare* (March-April, 1961), pp. 17-21, 19-23.
- . "Approaches to Measuring Adjustment in Adoptive Parents." *Quantitative Approaches to Parent Selection in Child Welfare*. New York: Child Welfare League of America, 1962, pp. 18-40.

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, (ed.). *Research in Social Welfare Administration: Its Contributions and Problems*. (New York: National Association of Social Workers (July, 1962; 127 pp.).

, and Maas, Henry S. "Factorial Dimensions of Characteristics of Children in Placement and Their Families." *Child Development* (March, 1962), pp. 423-144.

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; Hylton, Lydia F.; and Borgatta, Edgar F. "A Study of the Behavior Disorders of Children in Residential Treatment Centers." *Journal of Psychological Studies* (1963), pp. 1-23.

. "An Upsurge of Interest in Adoption." *Children* (September-October, 1964), pp. 193-196.

. *Foster Parenthood: A Role Analysis*. Minneapolis, Min.: University of Minnesota Press, 1966 (176 pp.).

. "Child Welfare." *Five Fields of Social Service: Reviews of Research*. Edited by Henry S. Maas. New York: National Association of Social Workers, 1966, pp. 85-143.

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. "Sources of Strain in Practice-Oriented Research." *Social Casework* (June, 1966), pp. 357-362.

. "Evaluating the Use of the Team Model." *Differential Use of Manpower: A Team Model for Foster Care*. New York: Child Welfare League of America, 1968, pp. 33-40.

. "The Role of Foster Parents in the Future of Foster Care." *1967 Special Conference on Foster Care of Children*. New York: Child Welfare League of America, 1970, pp. 228-240.

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, and Shinn, Eugene B. *Children in Foster Care*. New York: Columbia University Press (forthcoming).

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, and Shinn, Eugene B. *Dollars and Sense in the Foster Care of Children: A Look at Cost Factors*. New York: Child Welfare League of America, 1972 (47 pp.).

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Labov, William, and Fanshel, David. *Therapeutic Discourse*. (A socio-linguistic analysis of a casework therapy session, forthcoming).

Fanshel, David. "Research in Youth Aliyah: Some General Views." *Group Care: An Israeli Approach*. Edited by Martin Wolins and Meir Gottesmann. New York: Gordon and Breach, 1971, pp. 419-426.

. "Child Welfare." *Encyclopedia of Social Work*. New York: National Association of Social Workers, 1971, pp. 99-103.

, and Shinn, Eugene B. "The High Cost of Foster Care." *Human Needs* (DHEW-SRS), Vol. 1, No. 3 (September, 1972), pp. 28-31.

Fanshel, David. "Children in Foster Care: Repeated Assessment of Their Mental Abilities Over a Five-Year Period." Child Welfare Research Program, Columbia University School of Social Work, October 30, 1972. (108 pp; mimeographed).

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. "The Analysis of the Personal and Social Adjustment of Foster Children Over a Five-Year Period: The Influence of Preplacement Personality Dispositions, Family Attributes, and Experiences in Placement." Child Welfare Research Program, Columbia University School of Social Work, October 30, 1972. (64 pp.; mimeographed).

. "Parental Failure and Consequences for Children: The Drug-Abusing Mother Whose Children Are in Foster Care." Paper presented at Annual Meeting of the American Public Health Association, November 16, 1972, Atlantic City, New Jersey. (To appear in *American Journal of Public Health*, 1974).

Excerpts from Deposition of David Fanshel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORGANIZATION OF FOSTER FAMILIES FOR QUALITY
AND REFORM, *et al.*,

Plaintiffs,

—against—

JAMES DUMPSON, *et al.*,

Defendants,

NAOMI RODRIGUEZ, *et al.*,

Intervenor-Defendants.

DEPOSITION OF DAVID FANSHEL, taken before David M. Horn, a Notary Public of the State of New York, on Tuesday, April 8, 1975, at 9:15 o'clock a.m., pursuant to Notice, held at Columbia School of Social Work, 622 West 113th Street, Room 703, New York, New York.

(3) DAVID FANSHEL, after having been first duly sworn by David M. Horn, a Notary Public of the State of New York, testified as follows:

Examination by Ms. Gans:

• • •

Excerpts from Deposition of David Fanshel

[7] *Voir Dire by Ms. Lowry:*

Q. Dr. Fanshel, the studies to which you have referred, how many have been in New York City? A. The study which I am completing now, the longitudinal study, is exclusively in New York City.

The study of American Indian children involved 20 children from Louise Wise Services, and a certain number from Spence-Chapin Services.

The study of symptoms of children known to out-patient clinics included some children in New York City.

Q. With regard to the longitudinal study of children in foster care in New York, from what sources were you gathering information? A. Very varied. There were three teams initially established, one focusing on the parents, one on the agencies and one on the adjustment of the children. Dr. Jenkins, under separate finding, was studying the parents. Dr. Deborah Shapiro was studying the agencies [8] through telephone interviews with the workers handling the cases. In the first year, her staff had 900 telephone research interviews. Her book is being published this fall by Columbia University Press.

Q. Will you tell us in regard to the work that you yourself did? A. I directed the inquiry into the adjustment of children. And my data comes in various forms.

One, we had psychologists on our staff test the children 90 days after arrival in care, 2½ years later, and at the end of 5 years they were tested whether they were in care or had returned home. And the study focuses on the contrasts between the children remaining in care and those who had returned home, among other issues. They were given standardized psychological tests appropriate to their ages.

Excerpts from Deposition of David Fanshel

In addition, we have reports from school teachers about the adjustment of school age children. We had symptoms described by social workers who knew the children. We also had access to Dr. Shapiro's telephone research data.

We had a child behavior characteristics form filled out by the worker who knew the child. So it's a variety of test material and survey data.

• • •

Ms. Gans:

[15] A. Generally they both emphasize that most children are in care because their parents break down in their ability to function, in their ability to cope. And that may manifest itself in overt mental illness, it may manifest itself in what would be considered deviant behavior, arrests. But the overwhelming thing is the breakdown of parents to function that accounts for children being in foster care.

• • •

[22] Q. Do you have specific findings as to the rate of discharge of children in foster care? A. • • • Yes. 24% of the sample was discharged in the first year, 13% in the second year, about 8% the third year, 9% the fourth year, 7% the fifth year.

• • •

[23] Q. Does your study inquire into the relationship between the discharge of children from foster care and visiting? A. Yes. I refer now to Chapter IV of my book, which is exclusively devoted to visiting, and which will be published as an article in December in the *SOCIAL SERVICE REVIEW*.

Visiting is the best predictive variable in getting a child home. In the first year, if we relate visiting to discharge,

Excerpts from Deposition of David Fanshel

for example, just to give you some information on this question, parents who on the four occasions in which we got visiting information over the years who uniformly were reported as high in their [24] visiting, 86% of their children returned home.

That is, 43% of our entire sample were children whose parents uniformly visited them to the maximum possible; and 86% of these children returned home.

Another 14% of the sample had parents whose visiting went from low to high presumably as they improved in their functioning; and 53% of these children were discharged.

21% of the sample had parents whose visiting declined over time, and 36% of these children were discharged.

22% of the sample were parents who were uniformly low; and 41% of these children were discharged. These included a large group of mothers who could not visit in the first year because they were hospitalized; but when they left the hospital, took their children home.

So among a number of variables that are bound to be critical or significant in predicting whether a child will go home are visiting, behavior, the condition of the mother, and the investment of case work time in the case.

In my study those were the three important predictive variables. But also, ethnicity is a predictive variable.

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[26] The three variables I have been identifying are the quality of the mother, the amount of case work time, and whether visiting took place. • • •

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[29] In the United States, we have an enviable record of having moved from the large congregate institutions

Excerpts from Deposition of David Fanshel

where children used to be housed not too long ago, to the placement of children in individual family homes.

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[30] But that arrangement is based on the notion that a beleaguered parent who is succumbing to whatever forces are operating upon her in preventing her from functioning, can be assured that these services will be rendered on behalf of her children, and will also be assured that her parental rights will be respected. And tremendous emphasis is placed upon the need for respecting parental rights, because it was recognized by the people who helped create this system that if you could not remove the child from the system, if you created a system in which, essentially, you had transferred parents, that this would make the situation unacceptable to the biological parent who was in distress.

• • •

[31] Therefore, the selection of people, and supportive work done by agencies is to help the foster parent understand the distinction between having their own child, or having an adopted child and having an interim responsibility for somebody else's child. And it's not infrequent to find agencies working with the problem of foster parents being inhospitable to the own parent, or feeling that since they offer such superior care, why don't they take full possession of the child?

But that would be basically violating this rather delicate understanding of the agency as negotiated with the foster parent.

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Excerpts from Deposition of David Fanshel

[32] Q. Professor Fanshel, on the basis of your studies and your knowledge of the foster care system what, in your opinion, would be the consequences of giving foster parents, after one year, the right to try to keep foster children in their homes?

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[34] Many of these parents are poor, have limited education, have suffered through horrendous life experiences. And to interpose the foster parents in [35] any action in which the agency seeks to return the child to its own home imposes a burden on that biological parent which makes the system increasingly difficult for the parent to cope with.

Therefore, I see such action as creating confusion as to what are the respective roles. For poor people, it would mean that if you became mentally ill, or break down in your functioning in other ways, and you require the aid of a child welfare agency to provide interim care for your child that, with all the other problems you have to cope with, you have to also struggle with the fear that that foster parent will have replaced you. That will mean, as far as I can see, that poor people who need the service will be loathe to use it for fear of losing their child, and that they will resort to other arrangements less desirable, less subject to the service, the professional service that is required, and increasing the hazard that children will be cared for in makeshift, unsatisfactory living arrangements.

So that I would strongly oppose the giving of this right to foster parents merely on the basis that they have provided care under contract with an agency for a period of a year.

Excerpts from Deposition of David Fanshel

[36] Q. In your opinion, on the basis of your knowledge and experience of the foster care system, and your research, is it desirable, from a social policy point of view, to give foster parents, after one year, the right to plan for the children in their homes?

• • •

A. Foster parents do not have the competence to plan for the child. They do not have access to the full information besetting the child's family, they do not have, by training, the ability to appraise the child's vulnerability. They certainly do not have the ability to objectively appraise their own mode of care and their investment in the child.

The degree to which the placement arrangement is satisfactory for the child must be vested in parties who are not immediately interested in the outcome. It must be vested with parties who have professional competence to assess the situation.

Of course, when children are placed in foster families, there is some understanding that mistakes can happen. We have studies which show that when [37] children tend to accumulate in public group shelters, agencies become less strict in the standards they apply in the selection of foster parents, that they tend to take more risks, because they do not wish the child to continue in a large public shelter. But in taking the risks, they have to be ready on a standby basis if things are not working out as was hoped and anticipated, to remove the child, and place the child in another setting.

The assessment of foster parents is not a science; it requires an appraisal, a judgment. And often, the judgment is made under the stress of children accumulating

Excerpts from Deposition of David Fanshel

in congregate shelters. And certainly, the foster parent, who may develop a neurotic attachment to the child, or who may feel the need to displace the own parent, a fairly common phenomenon in foster care placement, is not in a position to judge whether their attachment is such as to exclude the own parent, or to burden the foster child with a problem in counter-pulls and identification. This has to be assessed by the responsible outside party.

• • •

[38] A. Foster parents have a very delicate and difficult task to perform. They must provide consistent care to children many of whom have suffered trauma in their earlier living experiences.

We ask the impossible of them. We ask them to be loving, devoted people, warm and giving to the children. At the same time, we ask them to do this without getting a return that parents normally get from their children. We ask that they not expect the reward for their administration to the children, in the form of total possession of the child.

So it is a rather delicate thing. And therefore, in interviewing applicants to be foster parents, great care is vested in assessing the underlying motivation, because a successful foster parent is one who facilitates the relationship of the child with its own parent. If that were not true, if the foster parent undermined that relationship even subtly, then that child would be in a situation which should not be inflicted upon him.

It's a very difficult assignment; and many of us who study this phenomenon have extremely high regard for people who are able to carry this out so effectively.

It is quite an astonishing performance that most of them do when they give this service to the community.

Excerpts from Deposition of David Fanshel

[39] Q. Professor Fanshel, on the basis of your study and experience, in your opinion is it possible for foster parents to be nurturing and supportive of a child, even though they understand they are to separate from the child?

• • •

A. Yes, by and large. In my study in Pittsburgh and [described] in the book Foster Parenthood, [and in] a replication study in Montreal by Louis Boivin for the Society for Service to Families in Montreal, the same thing was found:

In my study of foster parents, in the longitudinal study, we find that surprisingly, by and large, [foster] parents are able to make the distinction between having an invested attachment to a child as if it were your own, and having a time-limited and contained attachment, which is constricted by the contractual arrangement. Surprisingly, many of them are able to do it.

For many foster parents, it even goes the other way, where the foster parent can only relate to the child in certain age groups. In my study in Pittsburgh we found foster parents who could only take care of infants and very young children; and when they got older, [40] needed to have a new child brought in, and the older child moved on. • • • And of course, there were others who developed specialized capability with older children.

It is an important social phenomenon which we don't fully understand and need more research on, because we know that we tend to recruit foster parents from the lower middle class and the working class; but they seem to be a specialized kind of people. They seem to be more

Excerpts from Deposition of David Fanshel

traditional, they are less prone to have situations in which the woman will seek outside employment • • •

• • •

• • • They are people who are home-centered, allow easy entrance and exit of children from their families, don't make the kind of [41] demands for payoffs that middle class couples make of large extended family systems. • • •

• • •

[42] So we do have—while most do well—that is, the selection procedure—we do have many instances where unwholesome attachments are manifested, where there is lack of stimulation, where there is a severity in the child-rearing, which exacerbates the child's emotional difficulties.

A study by Dr. DeFries and Jenkins, in Westchester, showed foster parents who were having problems in the alleviation of emotional disturbance in children even when the best psychiatric care was given the children. That is, their inability to get related to the children's emotional problems was identified by the psychiatrist as one of a series of problems in placement.

For instance, teenagers were acting out problems with foster families. So that Dr. DeFries and her colleagues wondered whether the child welfare system would not have to move towards small congregate units because of this failure to resolve problems of children in foster family care.

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[46] What I worry about now is that in the absence of a large pool of children available for adoption that

Excerpts from Deposition of David Fanshel

many of the couples who normally would adopt are now looking to foster care as a way of assuaging their pain in not having a child. So I fear that the problem will increase, of the kind of attachment to a child which undermines the rights of the biological parents.

• • •

[47] Do you know whether there's a shortage or surplus of foster parents in New York City, for example? A. Foster parents have always been hard to come by, and it's nearly always been the result of active recruitment campaigns. And that doesn't mean that because people apply you have an adequate pool of applicants.

And so, one of the sources of great concern is a very limited pool of applicants to select from, and the problem that you may be mismatching a child with the wrong foster family because of the limited pool.

• • •

Ms. Lowry: Objection to relevance.

A. Well, you have a child with age, sex and behavioral characteristics. Professionals in the field have recognized that most people cannot be parents to all [48] children. They have certain proclivities. Some children bring out the best in them, some provoke them. • • •

So the problem is to anticipate the kind of child who will bring out the foster parents' best qualities in making the match. But that is an imperfect process. It's based upon appraisal of the child and the family. So that the placement must be viewed as an experiment in living. And it demands that the agency pay close attention as

Excerpts from Deposition of David Fanshel

to what's going on, because if they mismatch, as has occurred, the child will pay the consequences for that.

And we have the problem of foster parents demanding the removal of a child that they find, you know, not satisfactory. And one of the hazards of family care placement is the turnover in care.

• • •

In your opinion, Dr. Fanshel, on this basis, would [49] rules which permit foster parents to prevent the removal of children from their homes be desirable?

• • •

A. I think it would not be desirable, because what that suggests is that the foster parent is in a position to appraise their own involvement with the child. And in those situations which are familiar to family care agencies where the parent needs to use the child for their own psychological purposes, to replace a child who has been lost, for a variety of potentially neurotic reasons, is to ask those people least likely to be objective to appraise the nature of their own involvement. Their intense attachment to the child, despite the negative aspects of the relationship, makes it very difficult to disengage the child when an error in placement has occurred.

Q. Professor Fanshel, biological parents also have neurotic attachments to children sometimes.

In your opinion, are you applying a different standard to foster parents than to biological parents? A. Absolutely. If a child is living with the parents, [50] and they have emotional problems which severely intrude upon them, one attempts to get help for them. But the basic commitment to the biological relationship means that one

Excerpts from Deposition of David Fanshel

anticipates the integrity of the family is ongoing, and not to be disturbed. But if it is through an agency of the State or its surrogate, through a volunteer agency, that is a situation that must be corrected. And there is not the danger of breaking a traditional tie, a family tie; and so, there is a very different set of circumstances as between a foster child in a foster home and a child in his own home.

. . .

Q. Professor Fanshel, your longitudinal study focuses on children in foster care? [51] A. Yes.

Q. And you have already described to some extent the research methods.

Could you explain in greater detail the way in which you studied the children in foster care?

. . .

A. In our study, for example, in field interviews with the parents, we got developmental histories of the children, and created three indexes of their previous history before entering care, to include that in the equation in trying to determine why he looks the way he does five years later.

So we take into account the early life history, we take into account the length of time children spent in care, the number of turnovers they have experienced, whether they have been visited, whether they have gotten casework help, in quantity or not. We have taken into [52] account qualities of foster parents.

I remember, in designing the foster parent appraisal form, using inputs in Montreal for the New York study.

. . .

. . .

Excerpts from Deposition of David Fanshel

Q. Could you describe the kinds of ways in which you tested and measured how the children in your study fared in foster care? A. Yes. Well, the psychologists visited the children wherever they were placed.

We had three psychologists hired by our project. I tested them, as I believe I indicated, at 90 days, at 2½ years and at 5 years.

In addition to the intelligence testing, we gave the children a projective test, a figure-drawing test and a Michigan picture test.

[53] We also had the caseworker rate the child on behavioral characteristics on 117 items on a form developed with Dr. Borgatta, the University of Wisconsin, and now at Queens College.

We had teacher ratings on their school report form.

. . .

[54] Q. Professor Fanshel, in your work with foster care adoption in general, and in connection with this particular study, are you familiar with the psychiatric literature that has been developed on the effects of separation on children? A. It's not just the psychiatric literature. [exclusively.] It's an interdisciplinary area [containing a] literature which covers psychiatry, child development; it even covers animal studies.

In other words, this is a literature which many people have contributed to. And I'm acquainted with the psychiatric portion of it and I'm also acquainted with the other studies.

Q. Professor Fanshel, I show you these affidavits, which have been marked for identification, and ask you whether you have had occasion to read them (handing)?

Excerpts from Deposition of David Fanshel

Ms. Lowry: Before you go on, would you please identify the affidavits by the affiants and by the dates that the affidavits were executed?

Ms. Gans: Affidavits of Professor Joseph Goldstein and Albert Solnit, dated October 10, 1974.

Maybe I will limit it to this one, and just say A.

(Ms. Gans hands document to the witness.)

Q. Professor Fanshel, what is your opinion of the contents of the affidavit?

• • •

[56] A. Well, these are eminent psychiatrists and have distinguished professional histories. And I have no question on this level, that they are competent in their professional work.

It is only in terms of phenomena which must be produced by professional scholarship, that I deem it appropriate to comment, to make comment about.

There is an uneven history in psychiatry in terms of its fascination with the problem of separation, and its research productivity. The reason for the fascination with separation is that it is a linchpin in the basic psychoanalytic theory, • • •

But the history of this performance, in which I would place the work of people who have provided these affidavits, in that intellectual context is, as I have indicated, an uneven history in terms of the [57] rigorous necessity of the research.

• • •

(58) There is a school of thought which indicates that children can develop multiple forms of relationships with

Excerpts from Deposition of David Fanshel

adults, that they are sturdier and hardier than the proponents of the deprivation theses and those concerned with separation problems would indicate.

My major criticism of the pronouncements of the psychiatrist referred to is that these are based upon [59] selected cases from their own clinical caseloads. And the representativeness of these cases in terms of the larger phenomenon of maternal separation has not been demonstrated. There is no approach to measurement of the phenomena in a systematic way so that what I would consider analysis, data analysis, could take place. There is no quantification of their data in any form that a reputable researcher would respect. And therefore, one has to say that this is a very specialized view of the separation phenomenon.

• • •

Q. What were your findings, Professor Fanshel [60] concerning how children in foster care fared over the five-year period? A. I base this view on my follow-up study in adoption, my studies of American Indian children placed in 15 states, and a recent effort to test out—a computerization effort to gather data on child adjustment for the New Information System in New York, and on my longitudinal study.

And I basically have the view that, by and large, these children are highly durable, that they, amazingly, take all kinds of social insult and incorrect modes of handling, and come up their own feet. That is, the burden of the literature indicates a greater stamina, a greater ability to withstand trauma, than would [be claimed by] proponents of the “best interests of the child” school, who they portray the children as so vulnerable that after a year in one setting, if they move to another, they see the hazard

Excerpts from Deposition of David Fanshel

of a pathogenic process taking place which is so overwhelming a hazard, that one should [accommodate to] approve even the earlier transient relationship.

• • •

[61] A. • • • How They Fared in Adoption, a Follow-up Study, • • • was published by Columbia University Press in 1971—1970. In it, we find that the number of placements experienced by children prior to their adoption—and these were adoptions that were followed up to adulthood, with interviews with their parents—our data revealed that the number of different temporary placements experienced by the adoptees prior to their adoption seemed to bear very little relationship to their subsequent life adjustment.

• • •

I do not find this in the longitudinal study, that the number of placements correlates with negative outcomes in terms of the child's adjustment.

• • •

Q. Professor Fanshel, could you describe in detail your study, How They Fared in Adoption, giving the size of the sample and the various controls and the research methods you used? [62] A. I don't portray it as the world's gift to research. I have a modest perspective about it. It's more systematic than other people have done, but I do not portray it as resolving questions.

• • •

Excerpts from Deposition of David Fanshel

[68] A. Well, 42% of the samples had experienced only one placement. 30%, 2; 18%, 3; and 10%, 4 or more.

• • • [T]he number of placements was not correlated with the adjustment of the children, as one would anticipate from professional theory.

• • •

• • • I would say that I would advise continuity of care if all things are going well; and I would assume that agencies would take into account a child's attachment and his dependency on [69] others. I do take the position that if something seems to be going wrong in placement from the agency's perspective, that the weight of evidence is in support of the notion that there will be deleterious consequences. . . . [i]f the child has been visited by his parents, he's able to maintain dual relationships often.

So that the separation from the foster parents is not a separation from all of the important contacts he has had. It may be the restoration of the primary contact. And in this sense it's a tradeoff. He's gaining a lot from the restoration of primary contact. He may have an instantaneous reaction to the separation from what he's gotten accustomed to.

Q. What do you mean by "primary contact"? A. Well, we assume that relationships are ordered in this world, that every mamma and papa is first in your life. It's remarkable in the light of the people who have never seen their parents who have searched for them. And there's been this whole phenomenon in the adoption field of the quest of grownup people for their forebearers. So that I see as a primary [70] relationship the biological tie.

• • • I don't take the view that the primary relationship

Excerpts from Deposition of David Fanshel

has been improved if there has been total failure of the child-caring personnel. I do take the view though, all things being equal, that the relationship is the most significant one potentially, and it is the obligation of agencies to support that relationship. * * *

Q. In your experience, Professor Fanshel, did you find that agencies moved children lightly? A. No. As a matter of fact, to be critical of the agencies, it is that we would be more often likely to allow a child to remain in a situation, because under the pressure of high caseloads, the pressure of inadequate supply of foster homes, it's simply easier to let Johnny stay there than to find a new home and to go through the whole hassle of replacement. * * *

* * *

[71] I have seen appraisals of foster parents. And in the work of Martin Wolins in his book *SELECTING FOSTER PARENTS*, which is the name of the book, that view comes out, that under pressures there's a stretching of agency standards into accommodation with situations which under other circumstances would not be accommodated to.

So that I have the view that a more rigorous monitoring of this system would not permit children to stay where they are in many circumstances.

* * *

[74] Q. On the basis of your studies, experience and knowledge of the field, would you say that the fact that a child has been in foster care for a year alone is a meaningful criterion for determining the attachments which the child may develop?

Excerpts from Deposition of David Fanshel

Ms. Lowry: Objection as to form.

A. I find it's a rather arbitrary time figure. * * *

* * *

[75] Q. To your knowledge, Professor Fanshel, are there any standards for social work decisions?

* * *

A. There are general principles of work. For example, in this field, the Child Welfare League of America has promulgated a document called *Standards For Foster Care Service*, which is based upon very hard work by League professionals meeting regularly to conceptualize the bases for service to children in foster care. This has recently been revised; and it is up-dated regularly. This is similar to the kind of standards that the American Pediatrics Association and others maintain for their work. So that if one examined this documentation, one would find major orientations to this work.

There is also a licensing function exercised by the State and by the City so that professional staff come into agencies, read records, appraise what is going on in individual case situations. The agencies are required to report to the City agency and the State agency on what their plans are for the child, and so (76) forth.

So that my answer is that this is an area which is governed by professional concepts. To not have these would be anarchy, you know. Not to have set forth what are the principals of work in this field would create an intolerable situation, with 300,000 children in foster care.

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Excerpts from Deposition of David Fanshel

[78] *By Mr. Kantor:*

Q. Dr. Fanshel, in your longitudinal study, did you have occasion to look at not the reasons why, but the source through which the child was originally placed in foster care?

• * •

[79] A. Four out of five placements in our study are voluntary placements.

Q. 80%? A. Yes.

Q. And the remaining 20% came through the Family Court? A. Yes.

• * •

[80] A. Length of time in care was one of my most important analytic variables. And in my study of adjustment, I did not find what one would expect to find, that is, that length of time in care would be predictive of some breaking down process, predictive of loss in IQ, or predictive of increased emotional disturbance.

Q. Those were things you did not find? A. I did not find that. But when I differentiated by ethnicity, for example, on IQ changes, I found that Puerto Rican children showed an increase in their IQ related to being in care for the first 2½ years, and then it's stable.

The black children showed an enhanced IQ over a 5 year period.

The white children showed a decline in IQ associated with being in care.

• * •

[82] Q. I quote: "Of the 229 subjects still in care at the end of five years, 16 had experienced one discharge

Excerpts from Deposition of David Fanshel

and reentry, and 5 had gone through this experience on two occasions," So that's 16.

"Of the 367 who had left care, with 29 adopted children excluded, 33 had experienced 2 discharges and 1 reentry.

"6 had experienced 3 discharges and 2 reentries. And 2 had experienced 4 discharges and 3 reentries."

The total number of children who came in and out of care is about 10%, 62 cases.

• * •

[83] Q. I did record, and got from the worker, changes in circumstances which led to the exit of the children out of care.

For instance, 17% of the families where the child was discharged had moved to better housing, and 24.7% had moved without the condition being determined.

13%* had a change of family finances, with 13% accepted for public assistance, and 15% being self-maintaining.

31% of the families had an improvement in the natural parents' health, and an improvement in home status.

17% had a change in the presence of the parent, [84] that is, a parent had come home.

I had the agencies tell me whether they approved of the child coming home. And 47% approved strongly, 20% moderately approved, 16.5% had a mixed or neutral reaction. 7% moderately approved** 17% strongly opposed. So that by and large the agencies were in favor of the child going home.

• * •

* Sic. Probably should be 28%.

** Sic. Probably should be "opposed."

Excerpts from Deposition of David Fanshel

[86] 17% of the children who returned home came home because the mother recovered from mental illness. 12% of the parents had desired a time limited placement in order to work out their personal plans, such as to get job training or treatment.

Another 9%, a relative offered suitable plan for the care of the child.

Another 9%, the mother recovered from physical illness. • • •

[89] Can you tell me, Doctor, why you feel, then, that moves should be made carefully, and should be thought out carefully?

• • •

A. I worked, myself, as a worker in foster care as I started my professional career, so I know foster children, I know the pains that these children experience in moving. That is a very human situation, and one of which those who work with children are acutely aware.

It's with great regret that you uproot a child except on that usually glorious occasion when he goes to his own parents; and that is usually a time of rejoicing, that the family is reunited.

On the basis of our interviews with children at 2½ years, and I read—these were tape recorded interviews with foster children, in which I duplicated Weinstein's work at the Chicago Child Care Society, published in the book, *THE SELF IMAGE OF THE FOSTER (90) CHILD*—I read all of the transcript of these interviews with the children. And it came through in overwhelming good measure that the children had positive emotional attachments to their own parents, that their original parents have meaning for them. • • • what came through for me on the basis of reading all of these interviews was the meaning of one's own family to a child.

Excerpts from Deposition of David Fanshel

[91] What I object to in the depositions of the psychiatrists is the cavalier disregard of the value of one's biological tie. By "depositions of the psychiatrists", I mean the ones referred to by Mrs. Gans, and which were introduced into exhibit here.

• • •

[92] Q. Can you tell me, Doctor, in what respects, if any, you disagree with the theses propounded by Drs. Goldstein, Freud and Solnit?

• • •

[93] A. I don't pose as an authority on the book, because I would have to reread it. But what comes through to me as an error in the point of view taken is that they summarily and invariably would place a premium on the continuity of care, raising it to a legal problem or a program policy in this field, on the basis of selected clinical case experience that they had, and they want to generalize from the clinical cases that have been observed to the phenomena of foster care, which include many situations, types of situations, which they had not observed, and about which they provide no data.

So that it does seem to me that this provides an inadequate social foundation to develop social policy and program or orientation.

• • •

[94] A. I would characterize it as deductive thinking from general principles arrived at on the basis of other scholarship, working back to the problems of the child deductively from the general principles, without any reference to sampling, representativeness of cases, to the general

Excerpts from Deposition of David Fanshel

population of children in foster care. I find the reasoning quite specious.

• • •

[99] *Examination Ms. Lowry:*

Q. Professor Fanshel, I would like to ask you some questions about the longitudinal study to which you testified.

Can you tell me when the study was begun? A. It was begun in 1966, the first child becoming eligible for the study on New Year's Day, 1966; and we built up our sample through the period January 1 through August 31, 1966.

Q. How were the children selected for the study? A. They were elected by criteria which prescribed that they would have been in care at least 90 days; that they had never been in care before that; their siblings had never been in care before that; they were between the ages of infancy to 12 years and that they were charges to the New York City Charitable [100] Institution's [sic] budget.

• • •

[113] Ms. Lowry: I am going to quote from the table entitled, "The Exit of Children from Foster Care: An Interim Research Report" by David Fanshel, published in *CHILD WELFARE*, February, 1971.

Q. I ask you whether you said in that report in part—and it is quoting from page 67: "It is noteworthy . . . that we find children leaving care in the greatest volume during the earlier phase of placement, and this volume tapering off markedly over time."

That is your statement, is it not? A. Yes. I mean you are reading correctly.

Excerpts from Deposition of David Fanshel

Q. Considering the fact that you were studying this kind of phenomena, can I ask you why you limited your study to children who had been in care over 90 days when in fact there were children who entered and left the system during the 90-day period? Isn't it true that the discharge would have dropped even more drastically or sharply if you included the children who entered and left during the first 90 days?

• • •

[114] A. May I first explain that these data are updated and in final form in Chapter V of my manuscript, and I believe I gave you a copy of Chapter V.

• • • [I]t is true that in the first year one in four children were discharged in that time period but even at five years; seven percent of the sample [115] left care. So my perspective between the publication date of that article and my final manuscript has changed. The perspective that children continue to be discharged as far as the fifth year of care, my interpretation of that data is that the agency can still work on the problem of discharge with anticipation of some degree of success in getting children home.

Now as to the reason that we excluded children who were in care for less than 90 days, that part of our study was focused on the long-term effect of the separation from one parent in terms of personal and social adjustments. We made the decision if we continue to engage in an expansive study of this kind, we wanted at least 90 days of care and separation as indicating a substantial amount of separation from one's parent. Our study was not to include children who use foster care on short-term basis. We didn't anticipate there would be that much effect on them.

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Excerpts from Deposition of David Fanshel

[118] Q. It is a fact, is it not, that it is a [119] life-time system for many of the children?

• • •

Q. In fact, didn't your study indicate that at the end of five years, 39 percent of the children that you studied were still in foster care? A. Yes. Some of them were in institutions but some were in foster families.

Q. In generic foster care? A. Yes. • • •

• • •

[136] Q. Do you have an opinion as to whether the competence of the agency worker varies from agency to [137] agency? A. I have an opinion that it does vary.

• • •

[141] Q. Do you have any psychiatric training, Professor Fanshel? A. No.

[142] Q. Not all psychiatric theory is based on quantitative analysis, is it? A. No.

• • •

[143] Q. Professor Fanshel, are you familiar with the decision making process within individual agencies with regard to a plan for a child?

• • •

[144] Q. Are you familiar specifically with how that process takes place? A. I think it varies by agency.

• • •

Excerpts from Deposition of David Fanshel

Would it be your testimony that part of the impossible which the agencies ask of the foster parents would be to accept the agency decision no matter what?

• • •

[145] A. I was using that as a figure of speech indicating, if you will, pressures of a difficult assignment that foster parents were faced with. • • • A foster parent who interferes with the process of a child returning home is engaging in behavior which is problematic on various grounds.

One, it creates great difficulty for the child in finding his way with his own family. We must always keep in our mind that the children who remain in the foster care are encumbering a financial responsibility upon the community that is enormous. • • •

So it is of extreme importance that children be able to leave the system as soon as it is desirable and that foster parents facilitate that departure of the child for the child's own interest and also because the community has an interest that that child not use the expensive service unless no other recourse is [146] available.

Q. What about with regard to the foster parents of 39 percent of children in your study who had not left the foster care system after five years? A. Well, I would hope though, for example, the two years review under the 392 proceedings would result in proper adjudication of those situations. If it seems that the parents have dropped out of the picture that then actions be taken if the foster parent desires to adopt the child and that in those hearings those issues be brought out and adjudicated properly.

• • •

Excerpts from Deposition of David Fanshel

A. My understanding is that this case was restricted to an issue of what to do if a child had been in the home [147] for the year. In my study of children, some of them had been in foster homes for up to five years; and from a social policy perspective, it seems to me that children in long-term foster care are entitled to some resolution of their indeterminate status from a social policy perspective, if their parents have absolutely failed their child despite agency efforts to involve them, and I would indicate it is important to indicate that the agencies have helped the natural parents as a first condition, given that, if the agencies have attempted and the parents have not responded, from the social policy perspective, I would think that an alternate plan be arranged for the child so he is not in limbo. I am very much for foster parents who have had children for many years and wanted them for their own adoptive child, to facilitate that process.

• • •

[155] Q. At the time of the two-year review, you are in favor of foster parents objecting to proposed removal of a child from a foster home? A. Yes. In the context of an overall review of the Court, the parents must consider that the Court is reviewing the child's overall status and the foster parents' input as part of the overall information available to the Court.

Q. You are against the foster parents objecting to the removal of a child from a foster home; is that correct? A. Yes. That objection interposes a procedure which can result in a child remaining in care for a sustained period of time; can interfere with the child's movement [156] when that movement may be very necessary.

• • •

Excerpts from Deposition of David Fanshel

[159] *By Ms. Gans:*

Q. Professor Fanshel, are you opposed to foster parents adopting a child that is free for adoption? A. No. As a matter of fact if the natural parents have essentially abandoned the child and the child has developed a loving relationship with the foster parents, I would do everything to encourage such adoptions.

I do have one problem about the question of adoption, vis-a-vis foster parents, and that's from a social policy perspective, there is in my view a disposition in organized foster parents' groups to be unsympathetic to the problem of the natural parents and to promote the interests of the foster parents at the expense of the natural parents. I find a lack of compassion in their [160] organized efforts with respect to the problems of natural parents; and that gives me pause.

• • •

[170] *By Mr. Kantor:*

Do you oppose the participation of foster parents in the decision to remove children from foster care? A. I believe the principal person in that process is the parent and the parent's readiness to take the child home is central to the relocation of the child's home.

[171] I would be opposed to having the foster parent being treated as a co-equal partner to procedures and I think it is the responsibility of this social service system to meet the needs of the child and his parents. However, if the foster parent has information about the conduct of the parents and the effect of the parent's conduct upon the child, I have no objection to the foster parents sharing that information with the agency worker so that can be considered.

Excerpts from Deposition of David Fanshel

I think that is different than having the foster parents come into play at a hearing as to the suitability of the child going home.

• • •

[179] A. I think being a parent involves a civil right; that is, a parent has a right to plan the future of his or her own child; to interfere with that right is to interfere with a basic responsibility.

By Ms. Lowry:

Q. Do you think the parent or the child— A. I consider them both a part of the equation, and I don't see a child's interest disassociated from his parents' interest.

• • •

Excerpts from Deposition of David Fanshel

TABLE 9

INTER-AGENCY TRANSFERS, INTRA-AGENCY TRANSFERS, REENTRIES INTO CARE OF DISCHARGED
CHILDREN AND TOTAL NUMBER OF PLACEMENTS EXPERIENCED BY STUDY SUBJECTS OVER
FIVE YEAR PERIOD

Number of Placement Moves	Inter-Agency Transfers		Intra-Agency Transfers		Reentries of Discharged Children		Total Placements ^a	
	No.	%	No.	%	No.	%	No.	%
Zero	377	60.4	467	74.7	562	90.1	NOT APPLI- CABLE	
One	191	30.6	101	16.2	49	7.9	261	41.8
Two	50	8.0	44	7.1	11	1.8	186	29.8
Three	5	0.8	11	1.8	2	0.3	115	18.4
Four or more	1	0.2	1	0.2	—	—	62	10.0
TOTAL	624	100.0	624	100.0	624	100.0	624	100.0

^a Reflects the sum of inter- and intra-agency transfers and reentries into care after discharge.

Excerpts from Deposition of David Fanshel

TABLE 10
NUMBER OF PLACEMENTS EXPERIENCED BY STUDY SUBJECTS BY YEAR OF LAST DISCHARGE FROM
FOSTER CARE^a
(N=577)

Number of Placements	YEAR OF LAST DISCHARGE					Still in Care Five Years After Entry
	Discharged First Year	Discharged Second Year	Discharged Third Year	Discharged Fourth Year	Discharged Fifth Year	
	(percentages)					
One	79.5	56.7	38.6	45.1	25.0	15.9
Two	18.4	24.3	36.4	19.6	32.5	38.3
Three	2.1	17.6	22.7	15.7	22.5	28.6
Four or more	—	1.4	2.3	19.6	20.0	17.2
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0
NUMBER OF CASES	141	74	44	51	40	227
Mean Number of Placement	1.23	1.64	1.89	2.10	2.38	2.47
Standard Deviation	0.47	0.82	0.84	1.19	1.08	0.96

^a X²—182.059, df = 15, p < .001; F—Test (differences of column means)—39.818, p < .001.

^a Twenty-nine adopted children and 18 children transferred to state institutions not included in this analysis.

Excerpts from Deposition of Joseph Goldstein

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 74 Civ 2010 RLC

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY & REFORM, et al,

Plaintiffs,

vs.

JAMES DUMPSON, et al,

Defendants.

The deposition of Joseph Goldstein, taken at the Child Study Center, 230 South Frontage Road, New Haven, Connecticut, on Tuesday, April 1, 1975, commencing at 5:15 o'clock p.m., pursuant to the Federal Rules of Civil Procedure, before Robert W. Merchant, a Notary Public in and for the State of Connecticut.

• • •

[3] JOSEPH GOLDSTEIN, being first duly sworn by the Notary Public, was examined, and testified as follows:

Direct Examination by Miss Lowry:

Q. Dr. Goldstein, would you state your educational background after college, please? A. After college I received

Excerpts from Deposition of Joseph Goldstein

a Doctorate in Political Science from the London School of Economics; Law Degree from the Yale Law School; and I am a graduate of the Western New England Psychoanalytic Institute.

Q. Can you tell us what experiences you have had with regard to working with children, any research or treatment? [4] A. I have not treated children. My primary experience is through the literature and through a very extensive contact with Dr. Anna Freud, and study at the Hempstead Clinic in London, for three months, and continuous exchanges with her and also the Child Study Center here in New Haven.

Q. I show you a copy of a book entitled, *Beyond the Best Interests of the Child*. Are you familiar with this book? A. Yes, I am.

Q. Are you one of the authors? A. I am one of the authors of the book.

• • •

A. They are based substantially, though not certainly exclusively, I would say first on common sense, second [5] psychoanalytic theory and three, a clinical experience that is reflected in a large body of literature and the experiences of my two co-authors, actual experience of theirs, Anna Freud and Dr. Solnit.

• • •

[8] Q. Based on your training, do you have an opinion on how the existence of blood ties affects the development of emotional bond between the parents and the child and the child and the parents?

• • •

Excerpts from Deposition of Joseph Goldstein

A. On the basis of reading a number of cases which concern themselves with the development of emotional ties, it is my understanding and belief that there is an enormous investment on the part of the biological parent in the children and the best opportunity to develop emotional ties is when that investment continues from the moment of conception through birth, through the entire development of the child to adulthood, and so on. In that sense, a blood tie is very significant, but it is not critical in the event that, once the child has left the chemical exchange for the social exchange, once that child is part of this world, it is this relationship that develops with the caretaking adult over a [9] continuous period with the child, that person may or may not be the biological parent. Ideally it is.

Q. Based on your training, do you have an opinion as to whether it is possible for there to be an absence of significant emotional development between natural parents and the child—

• • •

A. I would say this: that psychological ties between biological parent and child in both directions need not develop or can be shattered by substantial interruptions of time, for separation and the length of time that is required for the breaking of those ties depends very much on the developmental stage that the child is at, at the time of separation.

By Miss Lowry:

Q. You just used the term, I believe, "psychological parents." What do you mean? A. By psychological parent we mean that adult or those adults to whom a child

Excerpts from Deposition of Joseph Goldstein

growing from infancy to adulthood can turn to and has an emotional investment in, and in whom the adults have an emotional investment. It's a two-way thing, a mutual thing, in which there are psychological bonds between the [10] adult and the child which gives the child a sense of continuity about the real world, a sense of belonging, a sense of knowing where he or she will be the next day, to whom that child can turn in times of trouble, in times of joy, for responses that recognize that child as an individual growing into a person in its own right.

Q. Based on your training and your familiarity with the literature with which you are familiar and your experiences at the Hempstead Clinic, do you have an opinion on what effect it would have on a child to remove him from a situation in which he has formed psychological ties with the adults? A. It depends on under what circumstances the child is removed, and for how long, but certainly if the removal is at the request of some outside force and against the wishes of the custodial parent or the psychological parent, in the instance you are talking about, it can have a very devastating effect. It can undercut the sense of authority that an adult has in the life of that person, and in turn, undercut the kind of trust the person has in himself or herself and in an adult world with whom it has to deal.

• • •

[11] Q. Based on your experience and training, would you consider it less detrimental to the child to review the decision prior to the child's removal from a situation in which he has formed psychological ties or subsequent to his removal? A. I have no question that when a child's custody is in dispute, that unless the child is in extreme

Excerpts from Deposition of Joseph Goldstein

danger or subject to gross neglect, the child ought to remain with the current custodian until the final disposition can be made, and that goes for biological parents who are psychological parents at the time, and it goes for returning a child after a very extended period with foster parents back to their biological parents.

• • •

[14] Q. Now, you were talking about a period of temporary foster care during which ties could hopefully be maintained with the parent from whom the child was taken, and then a period after this during which the child formed new psychological ties.

Can you define for us in any way the initial period, the period that you described as being a temporary period, in terms of the actual passage of time? A. Ideally, the temporary period would be a time set by the Court, for example, at the time that the child is placed in foster care and beyond which time foster care cannot continue with the expectation that the child will be restored to the parent from whom it is separated, with the expectation that enormous effort will be made to keep alive the ties between the child and the absent parent, • • •

• • •

[15] A. • • • that for a child, say, from one year or from early infancy until maybe two or three years, the maximum time for separation without maintaining contact with the absent parent might be two, three, four months.

For a child over that it might be six months. For a [16] child six to ten or twelve, and Dr. Solnit may be able to give greater specificity beyond that time, it could be longer.

Excerpts from Deposition of Joseph Goldstein

What I am suggesting in the paper is that even for the oldest children it never be longer than eighteen months and the presumption would be for a period after eighteen months that the ties with the prior or the biological parents or the absent parents have sufficiently broken, and that one looks to maintaining the new relationships that have developed. Any period like four or five years, no matter the age of the child, it is well beyond any period in which one could conceive of maintaining those ties sufficiently to justify intervention and changing that relationship prior to resolving the legal issues that might be involved in the shift.

Q. Would your conclusion in regard to this be different if the absent parent visited from time to time? A. Certainly one can help keep those ties alive if there is an opportunity for visiting and one would encourage in real foster care which we would call temporary care the opportunity for the child to visit with the absent parent and for the parent to visit with the child.

• • •

[17] * * * A. So the answer is to the extent that one can maintain these relationships one increases the chances of being able to restore the child to the absent parent.

• • •

Q. Based on your professional training, do you have any opinion on the effect on children of keeping them in so-called [18] neutral foster homes and do you know what I mean—do you understand that question? A. I've seen the phrase neutral foster home and it is discussed from time to time in a number of cases including those concerned with the Jewish child welfare cases of a number of years ago.

Excerpts from Deposition of Joseph Goldstein

I understand it is an effort on the part of the foster parents to somehow project themselves as aunt and uncle or some equivalent to that for the child in order to prevent the child from developing strong ties to the foster parents and in order to protect the relationship with the absent parents.

And my understanding is that it is time and the absence of the parents that breaks the relationship between the child and the absent parent, not the attitude of the foster parents.

• • •

[23] Q. Doctor, would you say that psychoanalysis is exact in the sense that a science like physics is exact? A. No, psychoanalysis is an art.

• • •

[24] Q. You define a psychological parent as one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. A. Yes.

Q. Now, is that a concept, Doctor, which is readily determined on a generalized basis?

Miss Lowry: Objection as to form.

By Mr. Kantor:

Q. Answer the question, Doctor. A. Yes, I think that there is a way of describing this from an outside vantage point, that which we as observers can determine, and in determining these characteristics of a relationship, can then posit that there is a presumption that psychological

Excerpts from Deposition of Joseph Goldstein

ties have developed and therefore the adult is a psychological parent.

Q. Can you tell me what indicia a judge, if you will, will [25] look at in determining whether or not a psychological parent-child relationship has developed in a particular case? A. I would think primarily the period of time and the uninterrupted quality of the relationship over that period between the adult and the child would be critical to that determination.

Q. Would there be other factors that would be taken into account? A. Oh, certainly. There would be a number of other factors, particularly whether or not the adult is perceived by the child as the parent or person primarily responsible for authority-making decisions, who comes to a period to be almost omniscient and all-powerful, yes.

Q. Would that be a determination that a lawyer or judge could make as adversary? A. I think there is no question about it.

Q. Is that yes or no? A. Yes, clearly can.

Q. And that a judge would be able to make a decision rather than someone trained in social work or social psychology? A. Probably from a variety of indicia that wouldn't even require such training except in a very unusual case. If, for example, someone described to the judge that a child has been [26] living in a family with one or two adults and some siblings or some youngsters for a period of time, say, for a child of three years, and for the last four years of that child's life, it goes back after school to a home to those parents, the ones that call the doctor and the like, the judge can with relative certainty decide, well, those are the psychological parents.

He may decide they are not good and that is another question, but those are the psychological parents.

• • •

Excerpts from Deposition of Joseph Goldstein

[27] Q. All right. Can you tell me what indicia would be used to determine when a pre-existing child psychological child-parent relationship had broken down or was no longer viable?

• • •

[28] A. One would call in as an advisor or some expert on children, a child analyst, child psychologist, whatever you will, who would examine the child, examine the adult parties involved, and give you a date on which these generalizations are based with regard to that particular child and would tell you the extent to which the ties with the absent adults are still alive, to the extent to which the child has felt abandoned by those adults, and the extent to which new ties have developed, • • •

• • •

Q. Doctor, are you familiar with, for lack of a better word, the phenomenon of adopted children, years after the adoption, seeking out their biological parents? A. Oh, yes.

[29] Q. Does this cast doubt on your concept in your own mind of the psychological parents—I'm sorry—the biological parent-child, psychological parent-child relationship breaking down after a comparatively short time, six months, eight months, ten months, eighteen months? A. No, I don't think it is evidence of that. I think it is evidence in each child of a strong interest in its origin and how it began, and whatever mystery is about their origins that are left unsolved or unanswered, there is interest in some children now adults a great need to find out about one's heritage and that, of course, is true with regard to family trees for persons who aren't adopted.

Excerpts from Deposition of Joseph Goldstein

That is part of being a human being, wanting to know about who we are and where we came from. It doesn't in any way undercut the on-going, day-to-day needs of a child for affection and stimulation from a caring adult.

Q. Doctor, you stated that the child's sense of time controls what essentially is temporary for adults, a sense of time, and you have said periods based on numbers of the age of the child, the child, under three years being two to three, four months, and a child up to about approximately six, being something like six months, and a child six to ten years, possibly longer, and but never longer than eighteen months. [30] A. Right. And I also said that figures are always, the time period must by definition be arbitrary, but I am willing to say that beyond eighteen months for any child, the presumption must be that the ties with the absent parent have been substantially damaged.

Q. Are you familiar, Doctor, with a study by Eugene Weinstein in 1965, published as, "Self-Image of the Foster Child and Parent"? A. No, I am not familiar with that.

Q. Did you perform any statistical analyses to reach the conclusions of your two, eight, ten, eighteen months? A. No.

Q. What were the figures based upon? A. They are based upon the experience, the clinical experience, that I draw on from my colleagues and the literature and the Robertson piece which I alluded to earlier, . . .

. . .

Q. The clinical experiences of the Robertson report, what population was that drawn upon?

[31] Dr. Solnit: Four.

Excerpts from Deposition of Joseph Goldstein

A. (Continuing) —three or four children whom they took into their custody at different times and in the spirit of science to which we have such allegiance, they kept a detailed account both orally and by film of the nature of that experience and the meaning of that separation for the four children involved, and tried to take into account and did study the significance of lapse of time as far as—

By Mr. Kantor:

Q. On those three or four children? A. Yes, right; right.

Q. Now, the Freud study, I take it that was separation during the Second World War? A. Yes.

. . .

Q. Do you know of any—withdrawn.

The clinical experiences that you base your conclusions upon, go ahead, Doctor. A. What I was going to say is the clinical experience [32] often involves reliance on material about children who are in trouble, who have been deprived. We as adults and parents and members of families, just as human beings who live in this world have a very substantial sense of what it means to be a child, and what it means to be a part and not how necessary it is for the child to have a parent be in contact with the child and to meet the child's need and to be responsive to it, and that is all that the continuity guideline is about, it is protecting the family relationship.

That is why the continuity guideline is so much in favor of minimum intrusion on family relationships by the State, in order to prevent interruptions of continuity. The real problem becomes in recognizing who the family is at any

Excerpts from Deposition of Joseph Goldstein

given point in time for the child, and very often the child may be if the child is placed in a setting other than the setting which is the constellation of the biological parent, it may be the real sibling and that is what we are talking about.

• • •

[36] Q. Child in foster care for four or five years, is discharged pending a final determination and the final determination is affirmed. A. Yes. •

Q. Can you tell me, then, Doctor, what harm, if any, would accrue to the child during the interim period to remain in the foster parent home? A. I think little harm, if any. In fact, to the extent that orderly process is the experience the child has with the outside world, the chances of transitional shift, because there will be need for a gradual transition to the new home, it can't be done abruptly if the new relationship is to develop securely. The child will be better prepared if it is done after a careful deliberation by society rather than an intrusion because that intrusion, no matter how you try to explain it to the child, is abrupt, is authoritative, dictatorial, in a way that will make the child's new relationship start out in a suspect way, wondering, can I now be removed from this other setting, no matter what the determination is. We are talking about an orderly process [37] for society determining the child ought to be returned to the natural parents after such a long stay.

• • •

[38] Q. Do you think that the proper determination of the child's best interest or the least detrimental is a legal decision within the competence of lawyers and judges or

Excerpts from Deposition of Joseph Goldstein

a psychological or social decision? A. I think it is a decision that has to be made in a court [39] of law.

• • •

[41] Q. All right. Let us take a child that is seven years old, who is placed in foster care with a particular— A. At the age of seven?

Q. With a particular foster-parent and the child's mother visits it every two weeks regularly, okay, in and at the end of that year, okay, can you say simply because the one year has passed, that the foster parent is now the primary parent in that child's life? A. No, I don't think you can say that • • •

• • •

[43] A. For purposes of deciding who ultimately should be the custodian, I would think you would want a good deal more information. For purposes of an orderly procedure in which that determination is made, I think it would be appropriate to presume that [44] the current custodian after that length of time is the primary custodian.

• • •

By Ms. Gans:

[I]f there is doubt about the ultimate outcome of the placement to make a shift prior to an ultimate determination because that only adds to a potential if not a very substantial detriment to the child's sense of who he is in relationship to whom, and in relationship to the outside world.

Excerpts from Deposition of Joseph Goldstein

Q. All right. Let us posit that there is no dispute, let us say. A. If there is no dispute, you ought to move the child immediately . . .

. . .

[48] Q. You said earlier, I believe you testified that to some extent time limits were arbitrary? A. Yes.

Q. What do you mean by that? A. What I mean by that is that any statute whether it is a fixed time to a sentence in a criminal setting or a given age [49] as evidence of a sufficient maturity to vote, they are arbitrary in the sense that you make a societal judgment that these people are qualified or not qualified. There are always exceptions on both sides of the line.

So what I am saying just in order to maintain the system we have to plunk down for a figure . . .

. . .

[52] Q. So you are saying you can't tell what kind of an attachment the child will develop with the foster parents in one year? A. You can tell that each time the child is placed for any substantial period of time, whatever its age, to the extent [53] it hasn't been totally damaged, to the extent it has some hope about the future, that it will try and hopefully the parents on the other side will try to give that child a sense of security and well-being that it hasn't got, his sense of trust in the environment and in those adults and ultimately, hopefully, in itself, and what you have described is someone who has been constantly hammered away at and saying, don't trust the environment, you can't trust yourself, you are going to be moved at whim or, well, that's your hypothetical.

Excerpts from Deposition of Joseph Goldstein

And I'm saying, don't create a process, justify another intrusion, particularly since you don't know whether the next move is final and is to be secure until you know what the next move is.

Q. When you are talking, trying to minimize detriment— A. Yes.

Q. —[W]hat do you see as the source of the detriment? And I will pose two alternatives.

Is the detriment primarily the break in the child's relationship with a person that it lived with for a year, or is the detriment what will happen to the child in terms of the care it will receive when it leaves that foster home? Where do you see the source of detriment? A. If you are talking from the child's vantage point, I [54] would guess both are anxiety-provoking experiences that would be very hard to digest and just adding another dimension that is going on. You have got two kinds of traumas being built in, saying you can't rely with all that going on inside you, you can't rely on the outside world to let you go home, sleep in the same bed, or be nourished by the same parents, or have a sense of care, being cared for, well-being. You are going to have to fend for yourself.

An adult can feel abandoned but he has the strengths often to cope with it, but putting the kid in another family, the same sense of bewilderment, only without the development over time of those internal strengths which permit dealing with those experiences.

. . .

Excerpts from Deposition of Joseph Goldstein

[DEPOSITION CONTINUED ON MAY 13, 1975]

By Ms. Gans:

[44] Q. Professor Goldstein, I wanted to ask you, in connection with the ideas propounded in your book, can you cite any study on which you relied which did not deal with infants or toddlers, at most, and does not deal with institutionalized children? A. Not studies, only court cases, of which we have seen a large number, and consultations.

Q. Those would be individual court cases that you consulted on or that Dr. Solnit consulted on? [45] A. Or court cases where we read the transcript.

Q. Reported court cases? A. Yes, of course, we read a number of case histories of children who are not infants.

• • •

[52] Q. Would you feel that the evaluations or reports of psychiatrists would be more reliable than that of the social workers? A. Not necessarily. I make my judgments about people with different training in terms of the particular individual and what I learn about him or her and their reputation and what I know about their work. It is very hard to generalize, you get a good garage mechanic and you get a bum. The same goes for all professions.

• • •

[53] Q. • • • In your opinion, a decision of a social worker might be as valid and reliable as a decision of a psychiatrist or a psychologist. A. An opinion of a

Excerpts from Deposition of Joseph Goldstein
Excerpts from Deposition of Albert J. Solnit

good, sensitive social worker may be as good as an opinion of a good, sensitive psychiatrist.

• • •

[58] Q. On Page 57, you are talking about the Robertson study? A. Yes. It was a study of four infants that Mrs. Robertson fostered during short periods, while the mother was in the hospital.

I think most situations involve giving birth to another child.

Q. On Page 57, you testified that it was a very significant study even though it only dealt with four children? A. Yes.

Q. You said on Page 57, I quote: "We are talking about peoples as individuals, not statistics, because statistics don't tell us very much." If the four children are individuals and other children are also individuals, how do we apply the findings from one set to the other?

• • •

[59] • • • You leave well enough alone. • • •

• • •

By Mr. Kantor:

[70] Q. Are you familiar with work of David Fanshel?

[71] A. No, I am not.

• • •

The deposition of ALBERT J. SOLNIT, taken at the Child Study Center, 230 South Frontage Road, New Haven, Connecticut, on Tuesday, April 1, 1975, commencing at 7:30 o'clock p.m., pursuant to the Federal Rules of Civil

Excerpts from Deposition of Albert J. Solnit

Procedure, before Robert W. Merchant, a Notary Public in and for the State of Connecticut.

• • •

[3] ALBERT J. SOLNIT, being first duly sworn by the Notary Public, testified as follows:

Direct examination by Miss Lowry:

Q. Would you give us your educational background after college? A. Yes. I received my Masters of Arts Degree in Anatomy at the University of California; an M.D. Degree at the University of California; and my Honorary Masters at Yale University. I am a graduate—well, I received full training in pediatrics and I am a member of the American Academy of Pediatrics. I have full training in general psychiatry and child psychiatry and analysis; and I am a member of each of the professional [4] associations which demonstrate that training or knowledge of this training.

• • •

A. I am the Past President, and this will indicate both my association and my role, Past President of the American Psychoanalytical Association; Past President of the American Academy of Child Psychiatry; Past President of the Association for Child Psychoanalysis; and am currently President of International Association for Child Psychiatry and Allied Professions.

• • •

Excerpts from Deposition of Albert J. Solnit

A. I have authored or co-authored two books and edited or co-edited two books, also.

• • •

A. They are about child development, child behavior, and *Beyond the Best Interests of the Child*, which deals with child development and placement of children and they have had to do with psychoanalysis and general psychology and relationship between pediatrics, child development, and psychoanalysis.

Q. How many professional articles have you written?

[5] A. Over seventy.

Q. What do they deal with generally? A. They deal with childhood, normative and deviant aspects of childhood, crisis situations in childhood, deal with the roles of the family and the raising of the child. They deal with the way in which parents react to their children, and children react to their parents. They deal with accidents in childhood and the relationship of children to their families and society.

Q. Can you tell us the major positions you have held in your employment since you received your medical training? A. I have been on the faculty at Yale University, and now am Sterling Professor of Pediatrics and Psychiatry, and Director of the Child Study Center in New Haven; on the faculty of the New York Psychoanalytical Institute, and the Western New England Institute for Psychoanalysis.

I am a training and supervising psychoanalyst in both of those institutes.

I am a member of the Board of Human Services Institute for Child and Family Services; and I am a member of a Committee of the National Research Council of

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the National Academy of Science, which is concerned with child and maternal health.

Q. Can you give us an estimate of how many children you have evaluated and/or treated during your professional career? [6] A. Well over two hundred.

* * * I imagine I would estimate that perhaps ten per cent of the children I've seen over the years have been in foster care at one time or another.

I was a consultant to the Connecticut State Department of Welfare in terms of training foster parents, providing in-service training for many [7] years.

By Miss Lowry:

Q. Dr. Solnit, I believe you stated when you listed your publications that you were one of the authors of *Beyond the Best Interests of the Child*? A. That's correct.

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[8] Q. Can you generally summarize the conclusions in this book?

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A. The conclusions in this book state that when a child is in a situation in which there is a conflict about either his custody or placement, we are not dealing with the ideal alternatives, but already have reduced the alternatives for that child to where we would feel it would be more accurate and precise to speak of the least detrimental alternative, rather than to speak of the best interest of the child.

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We feel that the criteria for what will help the court or professional or enlightened person to decide what is the least detrimental alternative, will be those guarantees of the continuity of affectionate relationships that shall be uninterrupted and be supported on a continuing basis, that if there are [9] conflicts about placement that the deliberations about these should take place according to the child's sense of time, that the judgments should be made according to what represents the best information about the best quality of life for the child in the immediate present and future and not based on long-term predictions. In our experience and in the literature it is clear we have limited capacity for long-term predictions.

So on the conclusions, they are, if you can establish continuity of affectionate interest and the guidelines, and if you can make your judgment based on the child's sense of time, carefully but as quickly as meets that rhythm of the child's way of experiencing life, if you can be aware of our limitations in making long-term predictions and be especially careful of the child's life in the present and the immediate future, we will be able to at least provide the child with the least detrimental alternative.

Q. Upon what are your conclusions based? A. Those are based on three major items.

One is deliberate studies—especially in the field of the deprivation syndrome of childhood.

Secondly, on the literature that is indirectly or directly concerned with what promotes healthy development.

And, third, from our own amassed clinical experience in [10] the case of Dr. Freud going back to the early 1920's, and in my case, going back more than twenty-five years, in dealing with children in variety of settings over this long period of time.

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Q. Are you aware of any professional opinion within your field either in the form of writings, or in the form of seminars or professional meetings which support the conclusions in this book?

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A. Yes, I am. There are, of course, small pieces of literature in ancient times that are summarized rather well in *The Century of Childhood*, by Philip Avies, but in addition, there are contemporary and modern studies which are rigorously carried out in our field.

It starts out with *The Rights of Infants* by Margaret Ribbel, of Columbia, a monumental survey of all the [11] world literature by John Bowby under the WHO auspices, the studies of Anna Freud in Vienna and in wartorn England, especially in regard to the children who were taken care of by her staff in the Hampstead Nursery, by the studies by James and Joyce Robertson, including the film studies of Jane and John and two or three other children. Going back to their study of children in hospitals starting back more than ten years ago they have studied a fairly large number of children intensively, and by "large number," I mean perhaps up to a hundred children, although not reported on each one, each of the studies is based not only on a careful study of a small number of individual children, but also on clinical experience the two of them have amassed in England and about which they have advised in other parts of the world.

It included studies by Rene Spitz, in South and Central America, as well as in other parts of the world including some of the children whose mothers were sent to jail for crimes in the United States. It also included the study of deprivation by Sally Provence and Rose

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Lipton, the book titled *Infants in Institutions*. That study was done in New Haven, and was a study that involved upwards of fifty or more children, and over a five to seven year period with a seven year follow-up.

And here one has to keep in mind that studies that [12] substitute quantity for quality are simply misusing statistics and insulting, I would say, anyone with awareness of the complexity of the statements. —

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By Miss Lowry:

Q. Dr. Solnit, based on your professional experience and training, have you been able to form a professional opinion with regard to the quality and nature of emotional bonds which can form between foster parents and children?

• • •

A. There are two major types of foster-child-parent relationships, those which are temporary and in which the temporary nature of the placement, leads to a warm, friendly attachment, but one which does not replace the prior attachment that continues between the child and the natural parents, especially and only if the natural parents are enabled to make frequent contacts with their child during the temporary placement.

Then there are those who are in long-term, so-called, [13] foster placement away from their families and these subdivide into two: Those in which they stay in one home, foster home, for a long period of time, and we in our own thinking have used the phrase, coined by Dr. Goldstein, to think of these foster parents as having a

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"tenured relationship" since it goes on indefinitely for a variety of reasons; and then there are those multiplicity of placements in which the child goes from one to another. The nature of the relationship in the last two, the second one which I called the "tenured" foster parent-child relationship, is a psychological relationship of primary nature which gets established.

These children feel that this is my mommy and my daddy, foster parents, and this is their home and they build their lives on the basis of the daily contact, the daily attachment, the daily feelings of love and sense of protection, the sense of feeling wanted and feeling an unqualified commitment from the parents. These are the criteria for establishing what we call the psychological parent that has been established and is maintained.

And those children who are long-term but live out childhood in multiple placement, the nature of the relationship is tragic because with each subsequent attachment, they are less able to relate to, to trust the world and the parents, that represent their world.

• • •

[14] A. If the child has been from an early age in foster placement for a short time and then goes on to another for a short time and then goes on to another for a lengthy time like a year or two, and then to another, it has a permanent effect in terms of a loss of emotional, intellectual, and social capacities. We have studied some of these and the loss appears to be permanent, narrowed or restrictive repertoire of emotional responses to human situations which ordinarily call for intense reactions and a wide range of reactions, and they also seem to form rather shallow attachments to other people. There is a lack of

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intensity of loyalty, a lack of a sense of permanence to these relationships.

Q. Now, you've also described at the beginning of your response to that question temporary foster care and different attachments.

[15] From the last two types can you define what you mean when you describe "temporary"? A. You are talking about the first category?

Q. Yes. A. By that, that has to be defined according to the developmental achievement and capacity of the child. Often for a shorthand we use the age, but we mean the developmental period for the child, his tolerance capacity, and his intolerance, so a child under two I would consider any placement over two or three months to be beyond that child's tolerance to stay related and to form an ongoing attachment to the person or persons with whom they had been living prior to the placement.

For a child from two years to four, I would say three or four months.

For a child under the age of six but older than four, I would say perhaps six months. And I would say that anything that goes beyond a year or eighteen months exceeds the tolerance of any child to, and here I'd define child as anyone under the age of twelve, because I think over the age of twelve we may be speaking of children who are able to express more mature judgments to a significant extent about placement and attachment.

Q. When you were discussing these time periods with the different developmental ages, would those be affected if there [16] were some form of contact during those time periods? A. Yes, they can be. Those time periods are the maximums for expecting in the usual situation that

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a child can retain the primary attachment but conditioned on the basis, on the expectation or condition that the condition is that the child should have frequent and regular contact with the natural parent or the psychological people he had before placement.

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Q. Now, with regard to the bonds that form between a [17] foster parent and foster child which I think referred to the situation in which the psychological parent relationship is created— A. Yes.

Q. —can you make any comparison between that psychological parent-child relationship, and the relationship that exists between the child and natural parent who are living together in an intact family? A. Yes. I would say that the child who is in the foster home for a significant period of time so that a psychological child-parent relationship is formed, is less well off than a child who has remained continuously in the one home in which the new, from the newborn period although it is the least detrimental alternative—by that, I mean the child who has not had to be moved into a second home is better off because the permanence of the attachment and the relationships served to provide them with a good basis for their entire development of the childhood once, from one home to another, already there is a risk that there is a disruption of an attachment usually, and that means that it is a disruption, it is a stress or challenge to the child's development.

However, it can be mitigated and reduced to minimum by having an adequate substitute in terms of the replacement [18] parent who may be adoptive or, as we say, the tenured foster parents.

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Q. Now, describe to us briefly the process whereby children develop emotional bonds with adults. A. In the context of being born helpless, the child forms very strong attachments. As they unfold their capacity to perceive and to recognize and to respond emotionally to these people who feed them, bathe them, put them to sleep, clothe them, protect them from the dangers of life on a daily basis, an hourly basis, the relationship starts with a sense of being cared for totally by this adult when the child is helpless. It gradually enables the child, to become active in its own behalf. The physical dependency is replaced by a love attachment, a dependency of a psychological nature which in the normative situation is made up of love, of affection, expecting that parent to be all-powerful and all-wise in providing for safety, for nurturance and guidance. This includes being able to tolerate the child's anger and frustration and help the child to deal with all of the conflicts and stresses of life that are part of growing up and reaching an increasingly mature level of capacity to understand one's self, to understand the world, and to find satisfaction in a world that one has some influence on.

Q. How significant in this process is the fact of blood [19] relationship between the adult and the child? A. It is only of vital importance when that blood relationship becomes transformed into the psychological relationship and then because that mother and father feel a close attachment preceded initially in the pregnancy with the expectation of a child and watching and feeling as the mother goes through her pregnancy and labor and delivery and preparing for psychological attachment. They have an advantage and in this sense the blood tie is advantageous in enabling the person to form the psychological relationship.

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However, the blood relationship is no guarantee of an adequate parenting capacity or that the psychological attachment will form if a variety of either accidental or nonaccidental events take place that interrupt that relationship or distort or dwarf it.

Q. What do you mean by—can you list the events to which you are referring? A. Yes. For example, if a mother becomes ill and has to be hospitalized for the illness, no matter how well motivated she is, how much she loves the child, if she is hospitalized, the child is deprived because she must be in the hospital and then there is no psychological attachment forming between the mother and the child.

[20] Or if the two parents are killed accidentally when the child is two months of age, which we have seen, in an automobile accident, that child has no psychological relationship to the blood or natural parents, and indeed the child's chances for a sound development is based on the opportunity to form the kind of attachments I have described before to another set of parents.

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[21] Q. With regard to a nonbiological parent during what period of times are sufficient relationships likely to come into existence with regard to different developmental stages of children?

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[22] A. We would expect that in the first two years of life an attachment would begin within a three-month period, and have a fairly significant and active effect. We would think that as the child grows it takes longer because as the child is less helpless and begins to use their

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own self-starting capacities, they take longer to form the dependency that is part of the attachment to these foster parents.

So under six years of age it may take six months and if the child were eight or ten years of age it might take nine months. But it isn't something that you can say, it's not here today, but it's here tomorrow. • • •

However, because we must try to preserve the child, we arbitrarily say, well, by now the attachment is significant, even though it has been occurring very gradually and made up of repetition, patterns of care and satisfaction, and gradual crystallization of relationships, as a result of these common concerns in which the mutual needs of the child and the adult are met by this kind of parent-child interaction.

Q. Does the passage of time have any further effect on the existence of these bonds?

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[23] Yes, passage of time may insure the attachment, if it is a steadily dependable one. The child's expectations and attachments deepen broadly and now become what we call permanent in the sense that the child expects them to go on as long as necessary to enable him to grow up to be independent and capable of starting their own family or friendships or own social groups.

Q. What effect does it have on the child to remove him from the home of an adult or adults with whom he has formed these psychological bonds? A. If it is a very short-lived move, and if the psychological parent or parents stay in touch with the child, it may have a temporary effect of being depressing and upsetting to the child.

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But if the child is taken out of the home suddenly for a long period of time beyond their tolerance of being able to remember or to feel the security of the previous parents, it has a devastating effect.

We have studied child after child in which this devastation registered, a loss of developmental progress that can be quantified within the area of speech, in the area of motility, in the areas of skills and competence.

[24] So no one should allow himself to take a child out of a home where there is a psychological relationship without knowing that there is a devastating effect especially if there is not an adequate replacement provided immediately for the young child, according to the child's sense of time and tolerance and, of course, for the older child proportionately so.

Q. Would this effect be likely to become compounded if this was two or three times that this was done? A. If one could put it in mathematical terms, it would be of geometric proportions. After three or four times, in most instances, the child doesn't try any longer to relate or please the adult or to form a warm attachment. They settle for a mechanical way of getting along.

Q. Would the effect be negative on the child if the child moves from one home in which he had formed a psychological relationship for some duration to another home with a second set of foster parents who were decent and adequate, would that affect how the child would react to the separation?

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[25] A. It does have an effect because it means losing one set of parents and having to deal with the loss and simultaneously and now beginning to get familiar with

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an attachment to strangers. Gradually it can be overcome but if there are too many moves, no matter how adequate the foster home is, there is a permanent loss of human capacities according to our study and experiences.

Q. Would the loss be mitigated in the place to which the child were going to be moved, if it were from a home in which he formed psychological relationships with the adult, would that effect be mitigated in the child if it were going back to the natural parents? A. It would be mitigated to some extent in the relationship with the natural parents, if there had been frequent and regular visits by the natural parents, although there is still, as we can see in many of the studies, there is still the period of time in which the child loses ground and has an unstable period, and is more vulnerable to trauma.

But the mitigation is that they do return to parents with whom they have maintained a relationship and, therefore, some of the former psychological relationships become available to them in promoting their development and, therefore, it is mitigating.

[26] The reason I am being careful is, I don't want to give the impression there is no effect.

Q. What if the return to the natural parent takes place after the period during which you had defined as temporary foster care at the beginning of your testimony? A. We have seen in the Robertson report instances where if you exceed the child's tolerance for that period of separation, that they have a very storm, difficult period. Some of them recover a great deal and some seem never fully recovered. Let's say if it goes four or five years and only see their natural parents once every six months, there is in those instances a permanent loss from what we can measure in regard to clinical, psychological, and developmental assessment.

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Q. With regard to what you consider to be the least harmful consequence to a child, do you have an opinion on a process whereby the child is removed from a home in which he has formed psychological ties during the period in which the decision to remove is still under review and which may result in reversal of the decision to remove? A. Yes. As few moves as possible are best for the child. If he is in a stable situation, it is better not to move the child until the decision is made.

We have seen time after time in this state, in Virginia, [27] in North Carolina, where we have been consulted, where they move the child away from the foster parents in most instances, and these instances these children have been with the foster parents in each one of these instances more than a year, these are younger children, move them into a neutral home (which can hardly be so from the child's point of view) pending the decision.

During that period there is such an erosion of the child's developmental capacity. There is such as a sense of distrust and hurt, the world is alien and threatening, that these children have a difficult time when they return to the former foster home.

We have studied a small number intensively, and I think we have finally won over some of our own welfare people. They no longer do that invariably in this area.

Q. Do you have an opinion on the effect on children of moving them to a neutral foster home when there is a possibility sometime in the future of a return to natural parents, or the purpose of the move being to keep ties from developing too strongly in the substitute home?

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[28] A. Yes. We have seen it happen repeatedly when an agency decided that they must interfere with what they consider to be a [29] too close attachment between the foster parent and child. • • •

In those instances, the child suffers a great deal because they are put into a home which knows they are only there for a short period of time and they don't know whether they are going back to the previous home or to some other home.

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I am only trying desperately to explain if they don't start seeing the child's point of view they are going to damage the child even though the concern of the agency is not that. The agency must be emphatic from the child's point of view.

Q. Have you been able to form a judgment with regard to whether children are capable of having desires and opinions about where they want to live? A. Yes, we always carefully in play therapy and in interviews and in our history try to get a factual inquiry about what the child would prefer. We make it clear the child is not burdened with the decision, so if they express a wish they are not putting themselves into a loyalty conflict.

[30] The situation is the responsibility of the custodial adult or those who have been asked by the agency to make the decision on legal grounds.

So we always take into account the child's preference and more often than not in the child's preference is a very important lead as to where the psychological attachment is.

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However, it requires interpretation, it often can't be checked with straightforward questions and answers. * * *

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[31] Q. * * * If I told you that the New York law has a procedure for full administrative review of decision on removal of a child from a foster home subsequent to the time that the [32] removal actually takes place for it? A. Not prior to, but before?

Q. Subsequent to and for the purpose of determining whether or not the removal should have taken place, would you have any opinion about the psychological implications of that procedure on the children affected by it? A. Yes, I would. I think any such review process that takes place after the child has been removed is a travesty on the need of the child that the child should not be removed unless there are grounds for removal, on the basis of abuse or neglect. But absent those factors, I see no reason from the point of view of the child's best interest to carry out such a review process after the removal.

In fact, it exposes the child to unnecessary risks of multiple placement and such arrangements must have a connection with what an adult needs to do, but it is contrary to the best interest of the child.

Q. If I told you the foster parent role has been articulated as that of a custodian to care for the child over a period of several years, and then willingly and without objection return the child, the agency, when the agency determines that is what should happen, based solely on the agency's determination, would you have an opinion with regard to how psychologically realistic [33] this is with regard to the foster parents? A. First of all, if

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foster parents accept that knowing it will take place in several years and are then required to return the child at a point where the agency thinks it is desirable, such foster parents are at risk themselves of changing their minds as they become attached to the child because they will, if they are having the experiences that most parents have, they will realize that a child of theirs is being taken away. We have such people coming to us to try to find help as they come and ask for help in changing an agreement because they realize it is a painful injury to themselves and even more so to the child especially as in some instances there have been no visitations or almost none, but occasional postcards or occasional gifts from the absent parent, and I don't mean to imply that the natural parent is necessarily a person who has a poor motive to the children. The removal may be because of illness or other circumstances I have outlined.

From the child's point of view, that is psychological abandonment, and that abandonment situation was taken care of by being attached to the foster parents on a long-term basis and from the child's point of view, it is devastating.

Q. From the child's point of view, what effect is such a policy likely to have? [34] A. It has a devastating effect on the child. In the most dramatic instances, we hear of them being torn out of the foster parents' arms and given to the natural parents and we know of others from our consultations and our own experience clinically here, which go far beyond my individual experiences, the Director of the Center, I hear of most of the cases here. And since we treat upwards of five hundred children a year, it means we have broad experience of how children react.

They are devastated, they wonder what has happened to the world, and it is full of frightening possibilities

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that something like this will happen again. They fight to stay with the foster parents who from their point of view often are really their only mother and father.

Q. Have you had any experiences either directly or in supervision of children being seen, with agency decisions either locally or anyplace, child care agency decisions, removing the children from the foster home with which you disagreed? A. Yes, I can cite instances, many of them in Connecticut, but also in New York and North Carolina, in particular, and in Pennsylvania.

Q. Do you have any, based on just the cases that you have seen, do you have any opinion with regard to how many agency decisions to remove children are contrary to the children's [35] interests?

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A. I cannot give you a good answer to that because those that are called to our attention are those where the agency has made an error. I don't know what percentages of instances that would be.

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[36] Q. Doctor, let me give you a hypothetical and see whether [37] or not you can come to any substantive conclusion with regard to whether it is in the child's interest to be removed from the situation.

Take a situation in which a sister and brother nine and six years old have lived with the foster mother for four and a half years. The natural parent either legally surrendered or abandoned the children and has not seen them in any case during the period.

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The foster mother was a woman of fifty-three and with arthritis, possibly she either does or does not get around her house as well as someone without arthritis would, but there is no allegation that she could not physically care for the children or that the children were not developing normally emotionally.

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And the purpose of the removal is to put the children into a group home with the possibility of adoption for the younger child and continued foster care for the older child? A. In another foster home?

Q. Yes. Do you have an opinion with regard to whether or not the removal should have taken place based on the facts I've given you? A. There is only one question. This foster mother was [38] positive about keeping the children?

Q. Very much so. A. I think it is an incredible cruelty that has been imposed on these children because from their point of view this mother was their mother and is their parent and they are being taken away, being kidnapped, in a sense, and the fact that it is legally so, is no less violent than any other kidnapping, and the state should not do it.

Q. Just one other hypothetical of a situation of an eleven year old boy in foster care five and a half years with the same foster family, originally taken from his natural parents at a point at which an abuse petition was going to be filed against the parent with regard to the entire sibling group, and in which the allegations of abuse were substantial and—

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At the time he came to the foster care was while he was on his way to state institutions and he has remained with the foster family for five and a half years and the foster family does not want to legally adopt the child because they are philosophically opposed to it, but they want the child to remain [39] with them as if he were adopted and seek legal guardianship for the child.

Do you have an opinion with regard to the removal of the child from that foster home? A. Yes, I do.

Q. What is that? A. It would be contrary to the best interests and what I hope to be the rights of the child to not be allowed to remain in a home where he feels wanted, where he feels that he is now related on a primary basis to that mother, and she to him, or he to the parents, and so forth, and that again he is to be subjected to some kind of manipulation by the state. In fact, I consider it in a sense an intrusion into the privacy of that family under those circumstances, trying to take a child away or suggested in that hypothetical case.

Mrs. Gans: I would like to note this objection for the record. Miss Lowry, by way of the hypothetical question, has presented her version of the facts of two plaintiffs.

The Witness: These are hypothetical questions only, and that's the reason I referred to them in the hypothetical.

[40] Q. And, Doctor, I am only asking you to answer with regard to the facts that I am stating to you on the record, and the last hypothetical situation is a situation of four siblings, four sisters presently 12, 11, 9, and 8, all four children in foster care four and a half years.

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The two oldest children were with foster families two and a half years; the two youngest children in one foster home for two years, and in the same foster home as their older sisters for two and a half years.

The natural parent is visiting sporadically during the four and a half year period, the children's reaction of the visiting being very infrequent and periods of time amounting up to a year of no visiting at all, of the children remembering instances of serious neglect prior to placement and the children stating that they absolutely do not want to ever leave the foster home or have anything to do with the natural mother or visit with her.

Now, the foster parent is seeking to keep the children with them. Do you have an opinion with regard to that situation?

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[41] A. With such infrequent visits over a four-year period, no one of those children could have retained a primary tie to the mother, the natural mother, if the foster placements even those two in each group were adequate, it certainly fits our harsh reality of the least detrimental alternative and it would be a violation of those children's needs and rights to take them out of the foster home in which they are and return them to the natural mother, however well motivated she may be and however much she may now be capable of not neglecting the children.

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[52] And you reached a conclusion, did you not, that a psychological parent-child relationship, a new one, would begin to form for a child less than two years at a three-month placement, and for a child less than six years at

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six months, and for a child between eight and ten at nine months.

Can you tell me how it was that you arrived at those particular figures, and those particular ages? A. Those are estimates. This is not something you can determine with mathematical precision. It's a manner of speaking, and it's a way of talking about how a child's memory serves the child, to keep alive the attachments, the feelings, the sense and [53] presence of those people, the parents who have been connected with an in care of the child, and it's a way of estimating the length of time it takes for the same children, in these different ages, to begin to know and have a sense of the new people to whom they are attached.

I wouldn't put much weight on the actual figures; those are really estimates.

Q. On what did you base those estimates? A. Well, I based the estimates on the fact that in cognitive, the knowledge about cognitive psychology, for example, until a child is about nine or ten years of age, they don't have the ability to conceptualize performance, they don't have the ability to conceptualize some aspects of time, which you have to do with the life span, whereas a child under the age of two has no way of being able to estimate time beyond a day or two at a time; and then I put into it the estimate of what a school-age child would know in terms of conceptualizing the calendar, how they would be able to discuss their separation from parents, and it's that kind of information, both from clinical and from Piagetian cognitive psychology that enables a clinician to form such judgments, estimates, I would say.

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[104] Attachments are formed much more quickly and indiscriminately in the first few weeks of life than they are, let's say, by the time the child is eight or nine or ten years of age, where a whole host of experiences, of developmental capacities to differentiate, to think, to remember, to initiate, to influence their environment with their own behavior now make them much more of a participant and much less of a passive party to the attachment relationship, and so as their sense of time moves toward the adult sense of time, their capacity to attach themselves to new people or to give up old attachments moves toward the same character—moves towards the adult characteristic ways of dealing with the loss of important individuals and the [105] formation of new attachments.

It's not precise, I use the word "associated with" because I don't think there is a point for point relationship, but there is a pattern relationship, as you move from one developmental period to another.

By Mrs. Gans:

. . .

Q. . . . [O]nce memory persists, what function can memory alone play in survival of attachments, and then how is it different from memory with some contact? A. Well, under the age of four or five, memory is not a very strong ally in being able to retain broken attachments or the loss of a person that's been important to the child. They may remember quite clearly who the person is, but the memory is not a sufficiently—does not represent a sufficient replacement for the presence, the physical presence of the person for a young child.

A young child needs the physical presence, as well as the psychological presence of the adult in order to feel

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safe and protected and nourished and guided and stimulated.

So although the memory may get to a point of four or [106] five where they can remember the person over a year or two-year period, that is not a sufficient replacement for the missing person. When you are fourteen or fifteen, the memory and its meaning to you, your ability to use it to guide you and to reassure you and to give you a sense of a presence, is much more important in the functioning of the child and, therefore, the older child, the teen-ager, can tolerate the absence and may not need as immediate and total a replacement, but at the same time, the teen-ager is now able to contribute much more to the decision by being articulate, logical, realistic and able to present a point of view, if they have one, that will influence and should influence the decision maker more than the wish or preference of the four year old.

• • •

[110] Q. I'm coming to a next question. Are you saying that if that is so, and contact is maintained, and then at the end of a year, let's say, you would not—you would want that child returned without weighing the relationship that's formed with the foster parent? A. You're now citing a different case?

Q. Yes. A. A child who is how old?

Q. Seven. A. Seven, who lives for a year in a foster home, and is visited frequently by the parents?

Q. Well, let's just say the maximum permitted by the agency regularly. A. Which is what?

Q. It's every week, every two weeks. It varies. A. And the plan was for the child to return to the father?

Q. Yes.

• • •

Excerpts from Deposition of Albert J. Solnit

Miss Lowry: You're asking if there should be an [111] automatic return, is that essentially your question?

Mrs. Gans: Yes.

A. I wouldn't see why the child shouldn't be returned to the father if no one objected. • • •

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[117] A. As a psychiatrist and psychoanalyst, if I were asked what would be in the best interests of the child, vis-a-vis that question Mrs. Gans has raised, I would say that before a child is moved from where they are living and forming attachments, if there is some question that needs to be resolved, it's best to resolve it before the child is moved, although you will realize that there is another guideline in this that must be followed if that—if the recommendation I have made is to make sense, and that is that the hearing must be immediate and it must be respectful of the child's sense of time so that there is no lengthy delay, because children do not tolerate delay, especially young children such as a four year old.

Therefore, if someone has something to say, which might hold up the decision, I prefer not to move the child until that's been clarified, but it should be clarified immediately.

• • •

Q. • • • When a child comes into placement, in your opinion, an agency should never tell a parent that they can assure the child's return? [118] A. Well, I would say they can say within reasonable limits, we can assure your child's return, if the following conditions and plan are

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carried out, but they should certainly be able to say also to foster parents, if something—

Q. To the parents. A. To the parents, to the natural parents, if something different happens, if the plan is not carried out, then one would have to look at the situation in light of the changes, and I would assume that one can't, you know, predict exactly what's going to happen in a six-month period. One can predict pretty much what may happen, or one could make a good plan and one could do what one can do to assure the successful execution of the plan.

Q. But let's say the plan has been carried out, you still would want the foster parent to be able to stop the return of the child? A. I didn't say that.

Q. What do you mean? A. I said if there is a conflict, then I would like that conflict resolved before the child is moved. That's all I said. And with great respect to the child's sense of time.

• • •

[120] Q. When you say that temporary foster care under no circumstances could last more than eighteen months, aren't you, in fact, selecting time as a criteria above all others? A. No, not really, because there was a built-in assumption in that line of questioning that there—where there was no visit, there is no contact between the child and the parents, and to say that we can make time the overarching guideline would be to leave out the fact that we put aside time problems if we can maintain through visitation and through frequent contacts the continuity of the relationship.

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Excerpts from Deposition of Albert J. Solnit

[121] Q. • • • But then you are not saying that time alone determines whether a child in a foster home forms a psychological parent-child relationship and time alone does not determine whether a preexisting parent-child relationship is destroyed? A. Passage of time in itself is only one dimension. It is a very important one, but there are other dimensions, as well.

• • •

[126] Q. • • • [at] page 22 of Beyond the Best Interests of the Child there is a statement that legal adoption is no guarantee that the adopting adult will become the psychological parents, and I wonder if you could expand on that? A. Yes. What we are saying is that putting two people into physical proximity doesn't guarantee the establishment of psychological ties. It depends on the motivation of the parents, the needs of the child, and in the older child, the motives of the child; so the process of establishing a psychological tie is one in which there is a mutuality of the child's needs and responses to the adult's expectations, and care, and if they are not motivated toward establishing that pattern of relationship, then the psychological ties will not be established.

We simply want to make the point that there is a process, and it's not a matter of physical apposition.

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Exhibit No. 1, Resume of Henry Ulmann Grunebaum, M.D.

EXHIBIT #1

HENRY ULMANN GRUNEBaum, M.D.

- Born June 5, 1926, New York City
- 1943-48 A.B., cum laude, Harvard College
- 1948-52 M.D., cum laude, Harvard Medical School
- 1952-53 Intern in Medicine, Beth Israel Hospital Boston, Massachusetts
- 1953-55 Resident in Pediatrics, New York Hospital
- 1955-57 Resident in Psychiatry, Massachusetts Mental Health Center, Boston, Massachusetts
- 1957-59 Fellow in Child Psychiatry, Boston City Hospital Child Guidance Clinic
- 1957-59 Visiting Physician in Pediatrics, Boston City Hospital
- 1959-60 Resident in Psychiatry, McLean Hospital, Waverly, Massachusetts and James Putnam Child Guidance Clinic, Boston, Massachusetts
- 1960-65 Senior Psychiatrist, Massachusetts Mental Health Center
- 1960-67 Staff Psychiatrist, James Jackson Putnam Child Guidance Clinic
- 1960-62 Assistant in Psychiatry, Harvard Medical School

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- 1962-63 Instructor in Psychiatry, Harvard Medical School
- 1963-68 Clinical Associate in Psychiatry, Harvard Medical School
- 1963-67 Director, Joint Admission and Child Development Study, Massachusetts Mental Health Center
- 1965-67 Resident Education Director, Laboratory of Community Psychiatry, Harvard Medical School
- 1966-67 Psychiatrist, Tunisia Peace Corps Project Wheelock College, Boston, Massachusetts
- 1967- Senior Psychiatrist and Supervisor, Southard Clinic, Massachusetts Mental Health Center
- 1967-72 Director, Intensive Nursing Aftercare for Psychotic Mothers, NIMH Grant, Massachusetts Mental Health Center
- 1968-71 Assistant Clinical Professor of Psychiatry, Harvard Medical School
- 1968-69 Lecturer, Boston University School of Theology, Boston, Massachusetts
- 1968- Senior Psychiatrist in Family and Group Therapy Cambridge Hospital, Cambridge, Massachusetts
- 1971- Associate Clinical Professor of Psychiatry Harvard Medical School
- 1972- Director, Center for Studies in Population and the Family, Health, Education & Welfare Grant

*Exhibit No. 1, Resume of Henry Ulmann Grunebaum, M.D.**Membership*

American Group Psychotherapy Association
 New England Council for Child Psychiatry
 Group for the Advancement of Psychiatry
 American Orthopsychiatric Association-Fellow
 Examiner, National Boards of Neurology and Psychiatry
 President, Northeastern Society for Group Psychotherapy, 1970-72
 Society for Family Therapy and Family Research
 Book Review Editor, International Journal of Group Psychotherapy, 1971-
 Governor's Advisory Council on Home and Family
 American Psychiatric Association—Ethics Committee
 National Board—American Group Psychotherapy Assoc.

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2. Grunebaum, H. and Altschule, M.D.: Sodium Concentration of Thermal Sweat in Treated and Untreated Patients with Mental Disease. *Archives of Neurology and Psychiatry*. 63:641-649, 1950.
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• • •

[13] *By Ms. Gans:*

Q. Is the question of the development of bonds and family ties a settled matter in the area of psychiatry, family-child psychiatry or is it controversial, or could you explain? A. This is a comparatively recent issue of interest. That is to say, in the 30's research was developed by Spitz and others, which suggested that children reared [14] in bad institutions fared very badly; and from this in the early 40's, Bolby wrote a very important monograph reviewing the literature on what is called maternal deprivation, leading to the conclusion that the child required a sustained and significant contact with his mother in order to be a healthy individual.

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

That conclusion was very influential in psychiatry and in general practice of pediatrics and to a considerable extent was exemplified by the writings of Spock in this country who emphasized the importance of mothers staying home to care for children.

Recently, as much more research has accumulated, people have learned—Maybe it will be useful if I cited Michael Rutter, *Quality of Mothering, Maternal Deprivation Reassessed*, who states, "What has been thought to be necessary for adequate mothering is a loving relationship which leads to attachment which is unbroken, which provides adequate stimulation, and which mothering is provided by one person and which occurs in the child's own family."

Each of these 6 ingredients has been called into question in the last 20 years, and the areas and the nature of the influence of these variables is still under study. • • •

• • •

[17] Q. O'Kay. What is the meaning and importance to the child of the bonds it develops to its own parents? A. That again is a complicated question. First of all, it is usual that the child's tie to his own parents is a persistent tie and remains throughout the relation of the child's life; so that the development of those ties is the beginning of a lifelong relationship.

Second of all, the nature and quality of those ties tends to influence the nature and development of future ties. A child who develops a warm trusting [18] relationship with a parent early on is likely to be able to develop other such relationships with other individuals later on, whereas a child who has had a difficult relationship with the mother is likely to be predisposed to difficulties in future ties.

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The nature of these ties, in addition, is important because these are the ties which place the child in his historical and biological continuity. He is a member of an ethnic group. He has gained a history of family experience, family culture.

The persistence, for instance, of the ethnic groups in this country bespeaks the importance of cultural heritage; and in addition, there is the importance of locating oneself biologically. One knows who one looks like, whose traits one has inherited. All of these characteristics bespeak the importance of these early relationships.

• • •

[20] Q. Does a child's ties to its parents prevent it from developing ties to caretakers such as foster parents? A. No, not at all. In fact, one would assume the [21] better the tie with the mother, the better the tie should be with the foster parent and vice versa.

Q. O'Kay. Is there any evidence that if a child develops an attachment to a foster parent or any non-parent, that the new attachment will displace or replace the child's attachment to its parents?

• • •

[22] First of all, I don't think—Replacement sounds so much like you take a spark plug out of a car and you put another spark plug in; and I don't think that is the nature of ties, to parents. That is, a child can have multiple ties to different people having different nature and different qualities; and I don't see that one can view this as replacement—It's the wrong way of looking at it.

• • •

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

[29] Q. Is it possible to predict whether a child will develop an attachment to a foster parent simply because it has lived in the foster home for a year? A. I don't think so. I think attachment is influenced too much by the quality of the relationship to make the prediction that that would occur. A foster child could have a loving and a caring relationship with a foster mother, and they could develop a very strong tie, fairly quickly; and a foster child could have a hostile and unhappy relationship with a foster parent who would be viewed as a provider of food and supplies, but not of [30] affection. It is impossible to predict.

• • •

Q. * * * I would also say that how a child responded to a natural parent upon being reunited with them would be a very poor predictor of what things would be like over the long haul.

• • •

[31] Q. Would you agree with the proposition that in the case of a child between 3 to 6 years of age, its ties to its biological parents cannot survive a separation of more [32] than 6 months? A. No, I wouldn't agree.

• • •

[T]he G.A.P. committee that I am involved with is writing a set of guidelines for custody and divorce cases, and one of the things that this is based on is the experience of family psychiatrists of the importance of one's ties with one's family over the generations and of the need of people to be members of families having a history; and to the extent to which this historical continuity is fostered, it would promote [33] health.

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I think it is analogous to the situation in the instance of a divorce where perhaps the parents are separated geographically and the child spends two months in the summer with its father. Even if the child sees the father for one month every summer, a 3 or 4 year old child clearly would maintain a tie with that father over that period of separation of 10 or 11 months; and the degree to which the child's mother would foster the continuation of that child would be a major influence in the child's perception of himself and his father.

• • •

Q. I want to go back to the question of measuring separation by time. Would you agree with the proposition that in the case of a child 6 to 8 or 9 years of age, its ties to its biological parents cannot survive a separation of more than a year, regardless of whether or not there is [34] contact? A. No, I wouldn't. * * *

In other words, we have data to prove that it is not a foregone conclusion that a 6 year old's ties to a parent cannot last a year. We have negative data. I don't know anyone who has demonstrated positive data.

To the best of my knowledge, there is no reason to believe, based on any data in the literature whatsoever, that a child 6 years old, ties to its mother will not survive a year. I have heard of no such evidence.

Q. I want to go to the next group.

Would you agree with the proposition that in the case of a child 9 to 12 years of age, its ties to its biological parents can't survive a separation of more than 18 months? A. I think I would say exactly what I have said about the younger children. To the best of my knowledge, there is no data to support that proposition; and whatever [35]

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

data one has in one's own clinical experience would support the view that the contrary is the case. * * *

* * *

The Witness: I cannot believe that Goldstein and Solnit or any other expert in child psychiatry would maintain that a child of 8 to 12 separated from their father or mother for as much as 2 years would not wish to meet that parent and have some strong feeling about them. I would predict, in fact, that the tie would be lifelong.

* * *

[39] Q. * * * Is the separation of a child from foster parents after a year comparable to the separation of a child from its own parents? A. Here we again have the word "comparable" and I would say the same thing about comparability that I said earlier. Namely, that these are different ties, and the reaction may have similarities; but that doesn't mean that it is the same.

* * *

[40] In a sense, one is asking for the following comparison. A child is separated and is in foster care for a year at some period during its life; and then at age 25, one is trying to ask is that child better off if it stayed with its foster parents or if it stayed with its natural parents; and to the best of my knowledge, there is no data to support either position.

[T]hat study has simply not been done, and the quality of care in these two homes is of critical importance; but we do know that the child has certain needs to locate himself biologically and historically. We do know that the child's tie to a biological—the child's biological mother

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has certain specific ties to the child that an adoptive parent is less likely to [41] have; and we also know that what happens in that year is of great importance to the extent to which the child's foster mother fosters a relationship with the child's biological mother.

Q. If we take, for example, a child that enters a foster home or foster care at the age of 5 years and has continued contact with its own parent, at the end of a year a decision has to be made whether to return the child home.

In making that decision, where in your opinion would be the greater risk to the child's development? Continuing the child's separation from its own parents or to separation of the child from the foster parent? A. I think I would be inclined to return the child to its biological parents in such cases.

I think the evidence would have to be extremely compelling that the child's relationship with the biological parents was harmful to the child for me to indicate otherwise. It seems to me that to the extent to which foster parents feel that they can obtain custody of children either de facto or de jure, to that extent, first of all, it mitigates against biological mothers feeling comfortable about using foster care; and thus, they would be inclined to press other people [42] into service, either relatives or other people informally, to avoid the likelihood that they might lose a child when, in point of fact, it would be in everyone's best interests for the child to be in a good foster home.

Furthermore, it places a potential incentive on the child's foster mother to separate and attenuate the relationship with the child's biological mother which can only be bad for the child. So that I think that that can only be harmful. It is very analogous to the issue I spoke of

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earlier about custody. It is in a child's interest to feel that its biological parents are good people, that its heritage is a worthy one; and to the extent where one feels that his heritage has been denigrated, it seems to me to that extent one would suffer identity problems in later life, feeling that there is a part of oneself that is unworthy of respect.

I asked you the question about the 5 year old child in foster care for a year with continued contact with its parents.

Would your answer be different if the separation was for 18 months or 2 years, as long as there is contact with the parent?

[43] Mr. Bienstock: I object to the form. Go ahead.

A. I think to the extent to which there is regular and frequent visitation, I think I would be inclined to return children to their biological parents, irrespective of the duration of the foster care.

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[45] Q. Doctor Grunebaum, are you familiar with the work by Freud, Goldstein and Solnit, entitled *Beyond the Best Interests of the Child*?

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• • • Yes, I am familiar with it.

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A. I think it's a terribly important book and in many ways a very useful book and many of the things that it states.

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

The particular thing that I think is most useful is the emphasis, the need for speed and decisiveness [46] in custody hearings; and that the present situation where hearings are likely to be drawn out over many months and years leads to a situation in which the de facto situation becomes fixed because the decision gets postponed indefinitely.

I think it is very bad for children because uncertainty of location is bad for the parents and bad for the child. So that I think that principle is very important, and I think the principle that one should take the child's point of view and have a perspective on child development is very important.

However, I think that their view that the child has one psychological parent and that this parent needs to be in total control and maintain as constant is erroneous.

Q. What is the basis of your disagreement? A. Well, I have indicated the evidence that supports the view that children have multiple attachments. I have indicated the view—See, I think Goldstein, this particular book draws its conclusions on the basis of psycho-analytical theory and psycho-analytical theory is only one of the ways we have of understanding children and their development today; and the evidence from psycho-analytical theory is largely gathered from the [47] study of psycho-analysis.

It ignores the considerations of child psychology, and it ignores the considerations of family research and family therapists. I think it ignores common sense in fact; that there are too many everyday examples of children having strong attachments to a father who has gone away to the Army to believe that a child has only one attachment and that one attachment is all important.

This more common sense view is supported by much of the research I have cited to you already. What I think

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

Goldstein and Freud meant or should mean really by constancy is that the child needs some sense of stability, that there is somebody that can be depended on. But that person who can be depended on can be different people can be several people over the child's life, that a child in the normal course of development will turn to a mother at certain ages and a father at certain ages.

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[48] Q. What is your opinion of the concept of the psychological parent as described in the book? A. I think I have said that already, indicating that children have multiple psychological parents and the psychological parents need not be the biological parents, need not be a woman, and need not be the central care giver.

• • •

[49] Q. In your opinion, and this is I believe a view advanced in the book, should only the child's interest be considered in placement decisions?

• • •

[50] A. No, I don't. I believe that the welfare of all parties to a custody hearing need to be taken into account; and in particular, experience in family psychiatry and work in family psychiatry and family therapy leads to the conclusion that while it is very important for children to be cared for and needed by their parents, it is very important for children to feel that there are things that they can do for their parents and that their parents need them; and one sees instances of the importance of children feeling that they are useful to their parents and

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

that they take their parent's welfare into account, and children will feel very guilty in adult life if they have some feeling that they have left a parent in the lurch in one [51] way or another when that parent needed them.

So it seems to me from the child's point of view, it is important that one takes the parent's point of view into account and vice versa.

• • •

[57] *By Mr. Kantor:*

Q. Fine. Doctor, would you be able to state without more information that a natural parent-child psychological parent-child relationship is replaced by a subsequent [58] psychological parent-child relationship after a period of a year? A. No.

Q. Let's suppose there is no contact during that year with the natural parent by the child. Would your answer then be the same? A. I guess it would be the same, yes.

Q. Suppose it was after 18 months. A. It would continue to be the same. • • •

So that I don't think that one can state a time period where it is clear and obvious that it is in the child's best interests to stay in foster care, for instance. You know, I guess that's about it.

Q. In a previous deposition in this action Doctor Goldstein at Yale testified in Court that a child separated, regardless of age, regardless of contact, more than 18 months, feels abandoned by the natural parent and generally within that period of time a new psychological [59] parent-child relationship develops. Would you agree or disagree with that statement?

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Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

A. I would disagree with that statement. First of all, it ignores the quality of the previous relationship and of the ongoing relationship. Second of all, it ignores the age of the child.

Third of all, it ignores the extent of contact of the child during the intervening period, and I have already indicated that children probably upward of 3 or 4 retain an ongoing memory of any major attachments that they have had for the remainder of their life; that there is no such thing as the psychological parent, that there are a variety of significant and central attachments in people's lives, out of which they form an identity.

To the extent to which they feel that some of these central attachments are in conflict with other central attachments, to that extent they will have difficulty forming a coherent identity for themselves.

Q. Doctor, would you say that— A. I want to add, I would also like to state that I do not believe that Professor Goldstein, whom I have [60] discussed these matters with, can cite any evidence to support his point of view; that it is a matter of personal opinion.

• • •

[62] Q. Doctor, can you conceive of any situation where a continuation in foster care with a foster parent is preferable to the return of the child to the natural parents, where that natural parent is fit and wants the child? A. I wish I knew the answer to that particular question because the most difficult form of it is the child in foster care from birth on for a considerable period, who the natural mother wishes to have him back and she is fit and able.

I think my inclination would be to return the child to the natural mother or parent at that point.

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

Q. Even in that most extreme situation? A. Yes, even in that most extreme state; but I have to state that is a personal opinion, and that the evidence to support that opinion or the obverse opinion is lacking.

• • •

[67] Q. You testified I believe in response to a question from Ms. Gans that where a child was in foster care for 6 to 18 months—and I believe the question was a young child of 5 years old, that it would be a major loss, I [68] believe were your words, for a child to leave foster care. A. Yes.

• • •

Q. You also testified in response to a further hypothetical that in the case of the 5 year old who is in foster care for one year, you would be inclined, to use your words, to return that child to the biological parents. A. I did.

Q. And that the evidence would have to be compelling to do otherwise. A. Yes.

Q. Now, there could be evidence I take it from that answer that would lead you to another inclination. Is that correct? A. Yes, there could be.

[73] *By Ms. Gans:*

I believe I asked you which decision in your opinion involved greater risk to the child; to put it another way, greater loss to the child—to return home or to be separated from the foster parents. A. I believe my answer would be not to return home [74] would be a greater risk, all other things being equal; and that there is unfortunately very little hard information in that area.

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

It is a matter very much of opinion, based on a variety of variables that we have discussed today.

Q. And does your answer assume that the separation from the foster parents entails some loss of the child?

A. It does indeed. It entails some loss for the child. It entails a period of readjustment to the natural mother, and I believe that loss and that separation is probably better for the child to go through.

Recross examination:

Q. (By Mr. Kantor) Doctor, you testified in response to a question by Mr. Bienstock that there could be evidence to indicate that your inclination to return a child to a natural parent, to change such inclination. Could you tell me what kind of evidence you would need? A. Well, I think I would require evidence, for instance, of physical abuse. That would be the kind of evidence that I would think of. Gross psychological or physical neglect would be the kind of evidence that would be important evidence, that the child's parent was alcoholic and that occurred frequently to the child's detriment.

You see, I think those are central factors in [75] this business. I think the problem of fitness is a very difficult problem because socioeconomic and educational conditions so often enter into our view of what is fit and what is unfit; and that in my experience, a foster parent tends to be a couple of a higher socioeconomic class than do the biological parents in many of these cases.

Q. In other words, Doctor, you are telling us that the evidence you would need to refrain from returning a child to a natural mother or parent would be the same types of evidence that would mandate removing the child

Excerpts from Deposition of Dr. Henry Ulmann Grunebaum

from the natural parent in the first place. Is that correct, Doctor? A. That is correct.

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Transcript of Trial on March 3, 1975

[6] MARIE R. FRIEDMAN, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Ms. Lowry:

Q. Dr. Friedman, what is your occupation? A. I am a psychiatrist.

Q. Where are you presently employed? A. I am director of the girls—the Young Adolescent Pavilion at Long Island Jewish Hospital.

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[7] Ms. Lowry: I move to have this introduced as Plaintiffs' Exhibit 1, and at this time on the basis of this curriculum vitae I would like to have it stipulated that Dr. Friedman testifies as an expert witness. Counsel for Foster Children plaintiffs has agreed to that, and counsel for the State has agreed to that. I haven't had an opportunity to ask the other counsel whether they will agree to that.

Mr. Hoffman: No objection.

Mr. Gallagher: No objection.

• • •

[8] The Witness: I run a psychiatric unit for adolescent, for young adolescents as part of the Long Island Jewish Hillside Medical Center.

Coupled with that is a day hospital program and an after-care program that I was instrumental in having established because of the necessity, the vital

Dr. Marie Friedman—for Plaintiff, Foster Parents—Direct

necessity of there being continuity in care, particularly for people in the young adolescent group.

In addition to that we have a new program that consists of a residential facility, youngsters not living in the hospital but living in a group home situation and coming to the hospital on a day hospital program.

I mention this and it is important and bear with me for a moment, because it is unique and because I think the need for this kind of facility has bearing on this particular case.

These are youngsters who have been abandoned, who having the way of juvenile court, who having the way of flunking out of foster care, ultimately ending up in [9] State hospitals, but because there is no other facility for them and then five years later we take the wreck and the debris of what is left and these are the youngsters that we are working with.

In addition I am consultant to the Town House School and the Lake Road School.

Q. Dr. Friedman, have you had occasion to evaluate and work with children in foster care? A. Yes. About 20 per cent of the children that we admit to our service are children who are referred by various agencies who are in foster care placement and come to the hospital for treatment, either temporarily and replacement after that, or return to the foster care setup.

Q. Based upon your professional training and experience, have you been able to form a professional opinion with respect to the quality of the emotional bonds which can form between foster children and foster families? A. Certainly.

Dr. Marie Friedman—for Plaintiff, Foster Parents—Direct

Q. What is that opinion? A. That biology plays very little part in the kind of bonds that are formed or can be formed. The capacity to relate and to form a bond between an adult and a child is dependent upon the two people involved. Certainly with a foster child, their hunger and need for nurturing and [10] sustenance can be even greater than with a natural child.

Q. Based upon your professional training and experience do you have an opinion on how this bond can compare to the emotional bond between a child and his biological parent?

• • •

A. The reason I asked you to clarify is that I think we all assume that between a natural parent and child there will be a warm, wholesome warm existing bond, which isn't necessarily the case. By the time a child is a foster child, they have already been hurt, traumatised and abandoned and because of that this will be an area of enormous sensitivity and consequently the bond that will then form between a foster child and a foster parent will initially be a little guarded but then after that, and after a sense of trust has been established, it could even be greater having already been abandoned by a natural mother.

[11] Q. Based upon your professional training and experience do you have an opinion on the effect of passage of time on the foster family bond? A. Where it is good, it will be enhanced. Where it is bad, it will get worse.

Q. Can you give us any opinion at all on the period of time it takes for a significant foster family bond to be formed? A. I don't think time is as much a factor as the qualities of the people who are involved. I think they respond immediately in a situation that is a good and favor-

Dr. Marie Friedman—for Plaintiff, Foster Parents—Direct

able one. Most of the times it does take a little time because youngsters who have been traumatized will be a little guarded in a new situation.

Q. What do you mean by a little period of time? A. That is a little hard to say. I would certainly think that within a matter of a few months either they are going to make it or it is going to be a very guarded relationship.

Q. Based upon your professional training and experience, do you have an opinion on the importance to the child of continuity and stability? A. I spent my entire professional life and stake my career on going to bat for continuity for everything [12] for youngsters. Whether it is maintaining the same social worker, the therapist, whatever. That is one of the basics, continuity, as far as child development is concerned.

Judge Carter: What if the relationship is bad?

The Witness: To maintain continuity in a bad relationship, one would try to make the relationship good. If that couldn't be done, then a change would have to occur.

Q. Based upon your professional training and experience do you have an opinion on the effect on a foster child of movement from one good situation to another good situation? A. I think it is a basic tenet with children in child development that changes of any kind, unless they are absolutely essential, even if they are good changes, are bad for kids. Kids react badly moving with an intact family from one neighborhood to another, and changing schools and having to change friends. And that is pretty minimal in comparison to moving from a family, a whole total family situation to another total family situation, even if it were to be a good one.

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Q. What do you think the effect is on children moving from place to place, from home situations to home [13] situations? A. Are we talking about from good to bad or good to good? A. Perhaps you can answer that in two different ways. From good to good and from good to bad. A. I think I answered from good to good. I think change is essentially bad and requires a great deal of work and adjustment on the part of the child. Even if it is going from one good situation to another. To go from a bad situation to a good situation, I think everybody would be in favor of except that that also requires a lot of work to be done.

To go from one equally good situation to another equally good situation would have all of the earmarks of the evils of change as they affect children, and would serve no good purpose.

Q. How are the evils of change that you just mentioned likely to specifically affect children? A. The first thing that happens when a youngster is traumatized is that regression is the first thing that occurs and how far a youngster will regress will be dependent upon what degree of pathology existed at the time that another stress in the form of change was imposed upon him. And regression can go all the way into a psychosis, into [14] a paralyzing depression and it can stay there and be permanent.

Again, depending upon the degree of pathology already present.

Q. Do you have an opinion on the effect of moving a child from a foster home in which ties have been developed to a neutral foster home so as not to weaken the attachment to the biological mother? A. I think it is gross insanity. . . .

Q. Do you have an opinion on the damage that could be done by separation which is later found to be contrary

Dr. Marie Friedman—for Plaintiff, Foster Parents—Direct

to the child's best interest? Can such a separation be repaired, the damage of such a separation be repaired subsequent to the removal of the child? A. That if a child were moved and then it turned out that was a mistake?

Q. That is right. A. And then it could be corrected by putting the child back?

[15] Q. That is right. A. You need a pretty healthy kid in order to sustain that kind of a situation, because children who are foster children have been so traumatized by the initial abandonment of their natural parents that somewhere, some part of them is constantly searching for the idealized parent. When they get pretty close to an ideal and they are taken away, traumatized further, returned again, their faith and trust in the human beings playing chess with them becomes so impaired that their capacity for development becomes permanently impaired.

Q. You testified that many of the children with whom you work are children who have been or presently are in foster care.

Generally could you tell us what kind of experiences these children have had that have led up to their hospitalization and what kind of psychology problems they manifest? A. It is hard to put it together in general terms because children are individuals and quite specific.

Again let me preface this by saying the children who are here are only the children who have had the most trauma and the sickest and the ones who compensate as a result of their life experience. What I say doesn't [16] apply to all foster children, only, because there are many of them who make very successful lives living with their families and never come to a psychiatrist.

The kids that I see that have in common certain things, youngsters who have experienced enormous trauma by the very fact of abandonment and being in a foster care

Dr. Marie Friedman—for Plaintiff, Foster Parents—Direct

situation. One of the things that they all have in common is the sense of uncertainty that exists in their lives, even if it is a relatively good foster home situation. The social worker comes to visit and it is a reminder that this is only a temporary place.

There are all kinds of things going on that remind these children that this is not their permanent home and these are not their parents and this sense of uncertainty coupled with those circumstances where movement has to occur for whatever reasons, from one foster home to another prevents any real bonds from forming.

I think probably a typical case is the—maybe a little less than typical, is the youngster I have right now who has been moved around so much that even though the last foster home that he has been in, he has been in for four years, he has not been able to establish a human bond with a human being.

When he runs into trouble and he has difficulty, [17] he runs away to Queens Children's Hospital out at Creedmoor. That has become to him the nurturing object and this is what can happen to a youngster when they aren't able to be in stability in one home.

Q. Is this a child who was moved a number of times before his present placement? A. Yes.

Q. Do you have any familiarity or dealings with child care agencies who have children in foster care? A. Yes, I do.

Q. Do you have any experience with the decision-making processes in these agencies? A. I do, and I don't like to say it, but the fact is that this is an area of enormous distress to those of us dealing with psychiatric problems and child development problems.

Q. Could you tell us why? A. I really wish I knew the answer. I can only describe what goes on. There can be

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a dossier ten inches thick on a youngster. It can have information beyond what anyone needs to make any kind of a decision, and either it isn't read or it isn't understood, and all kinds of action goes on in terms of moving kids around inappropriately without regard to the already compiled information or to [18] recommendations that supposedly they come to us for.

There is a kind of—I am sure it is based on some good intentions, a sense of ownership as far as children are concerned. For a given agency, these are my kids and this is our agency, and there isn't an overlap to move into another agency if that particular agency doesn't have an appropriate facility.

It is kind of a jealous guardedness, what we can do, we can do better than anyone else, even though we don't have the right kind of a group home or the appropriate foster family.

The net result is the kids fall between the tracks.

• * •

[20] Judge Pollack: Doesn't every case have to depend upon the particular facts of that case?

The Witness: Beyond the generality, certainly I would hope that the specifics of each case would be dealt with.

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[38] Judge Pollack: Suppose a fit parent is the ultimate object of foster care to arrange for an adoption or a return to a fit parent or some third alternative?

The Witness: The answer is very simply what is going to be best for the child. If a parent is ill and the illness looks to be a temporary one, temporary care for the child is what is to be desired,

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right? If a parent manifestly is unable to care for a child and if we know that beyond the manifest things that are there, psychologically, unconsciously the parent, although they may recover physically, will reject and abandon the child, [39] as a psychiatrist certainly my recommendation would be that foster care toward an objective of adoption would be what would be desired.

Cross examination by Mr. Hoffman:

Q. If in fact the natural parent has been found to be fit, whatever the temporary problem that she previously had has been dealt with, is—between the choice of continued foster care and returned to the parent, which is—
A. I would certainly think the answer would be return to the natural parent.

Q. Even if it were the case that some type of a bond had developed between the foster children and the foster parent, if the natural parent is fit and able and willing to care for the children, would it still not be in your professional opinion in their best interests to return to the natural parent? A. I just said yes.

• * •

[42] *Cross examination by Mrs. Gans:*

Q. What I am trying to establish is does the—assuming that a child has established an attachment with a foster parent, but has also had an attachment to its parent, does one have to cancel the other out? A. No. One doesn't cancel the other out. And I think characteristic of the problems that exist with not only foster care children, any child who has lost a parent early in life, is that there is

Dr. Marie Friedman—for Plaintiff, Foster Parents—Cross

a sort of universal search for the lost parent. Idealized though it may be, it goes on and on. Children can have very adequate adjustments to life with the absence of a parent, whether it is replaced by a foster parent or not, and continue to have that yearning, longing search for the original parent.

In the case of foster children, it is a very permanent thing around adolescence where they become runaways and look for their foster parent unless something has [43] happened that they have been able to see them and able to know them somehow and able to know what it is they are running to or not running to.

Q. As an example, if a child—let us say a seven-year old child enters foster care and has had a good nurturing relationship. It then develops a good relationship with a foster parent. It returns home after a year. Is the child capable of resuming the relationship with the original parent? A. There are so many vital things that are left out of these hypothetical cases. If a child leaves what had been previously an intact home with a loving and nurturing mother and leaves with a heavy heart, and plenty of hopes of going to be able to return and if in the course of a year—and I can't imagine an interested mother not being able to make some kind of contact with the child—

Q. Let's assume contact. A. The question is when am I coming home, just as soon as you can, et cetera. Then human being are very self-protective, they don't let themselves get hurt too much. Then the child obviously knows home is where the heart is and they are not going to make the kind of attachment, child-parent attachment in a temporary situation because they haven't broken the other one.

Florence Creech—for Children—Direct

[48] FLORENCE CREECH, called as a witness, having been first duly sworn, was examined and testified as follows:

Ms. Bittenwieser: Your Honors, my name is Helen L. Bittenwieser. I am the court-appointed attorney for the children.

Direct examination by Ms. Bittenwieser:

Q. Mrs. Creech, would you give us your present position and any facts in your present position or past experience which qualifies you as an expert in foster care?

A. I am the executive director of the Louise Wise Services, which is an agency helping children and parents. We have a foster home program. We place children for adoption. We have a maternity residence and a residence for mothers and babies.

I have had over 35 years of experience in the child care field, including all phases. Foster home placement, institutions, day care, adoption, services to unwed parents.

I have also served as a consultant for the Child Welfare League of America, which is the national standard-setting agency. Have served on their board. I [49] have served as their chairman of standards on child care.

Q. Mrs. Creech, in considering the return of children to their own homes or placement in another foster home, are all of the situations identical? A. Indeed not.

Can you tell the Court briefly some of the general types in different situations that exist, so they know what we are talking about? A. I would like to first say that I think we consider foster home placement, any kind of placement of children, we have to think in terms of permanent planning for children. Not think of foster home placement in itself.

Florence Creech—for Children—Direct

And that all that we are doing in placement must be geared to an ultimate permanent plan for a child.

I think there are many kinds of situations in which even though we do not want to move a child, it may be necessary. In fact I feel very keenly about not moving children from home to home, but we do have situation where a child may become free for adoption and the foster parents want to keep the child forever, but they really do not want adoption. An agency then must determine would it really be in the best interests of that child to remain in this particular foster home or should that child have the opportunity of being placed for adoption.

[50] I can think of other situations where the foster mother is very eager for adoption. The foster father is not. This is a case where the child is free and an agency would consider this particular family but there is a difference between the parents. Both parents feel—

Judge Lumbard: You used the expression "when a child is free." Would you explain just what you mean by that?

The Witness: I mean the child who either has been surrendered by the natural parents or where an agency has taken legal steps to terminate parental rights.

At our own agency we always first want to consider the foster family if a child can be placed for adoption, because we do not want to move the child. And in a great many instances the foster parents do adopt the child, but there are situations where it would not be in the child's best interests.

There are cases where the foster family has given very good physical care to the child, but where the agency feels that psychologically this would not be the best home for the child to grow up in.

Florence Creech—for Children—Direct

Then there are situations where the child is not free for adoption, but where there is consideration of the child returning to his own home or cases where it [51] might be felt the child should return to another foster—should be placed in another foster home.

You might have two cases where the facts appear to be the same, but yet they are completely different. For example, you can have a situation where a child has been in the same foster home for a few years. The natural parents become ready, have been rehabilitated, can take the child home, but where, after very careful consideration, the agency might feel that it would be best for the child if that child could remain in the foster home.

On the other hand, you can have the same set of facts where the agency might feel that it would be in the best interests of the child to be returned to the natural parents.

Then we have cases where we sometimes have had to move a child from a foster home where the parents, the natural parents want to have continued contact. Their plan is within a year or so to bring the children home and where we find that in spite of the agreement that the foster parents have signed, in spite of the understanding we have with them during the study that they will not participate in any visits, they are against visits with the natural parents, and where it may simply mean that we would have to move the child, or the kind of situation—

[52] Judge Lumbard: That you would have to do what?

Florence Creech—for Children—Direct

The Witness: That we might have to transfer the child to another home. We might have the kind of situation where the parent has to be out of the picture initially through no choice of his or her own. Maybe in the hospital, maybe in prison. And then he is out in the community. The foster parents may have become very attached to the foster child, which is what we want. We want them to love the child. Nevertheless, their own feelings will get in the way of the child reestablishing a relationship with the natural parents.

So that here again we might have to think in terms of moving the child to another home. But there are just no two situations the same, as I said in the one example I gave. You can have the facts that sound the same, but they are not. It does mean that an agency must exert every kind of caution, great skill, great sensitivity and be ready, as I certainly am, to always put the needs of the child above the needs of everybody else.

I do want to add here that at my own agency and I think many agencies, we, during the study of a foster home, before that home is licensed, we go into a great deal of detail about visits of the natural parents, the [53] respective roles. This is written out in an agreement which is signed. We also give our foster parents a statement on their legal rights as foster parents, letting them know what recourse they have if there should be differences.

Judge Carter: May I interrupt and ask a question.

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Mrs. Creech, am I correct in understanding when you are saying a permanent plan, when you get a child, based on the circumstances and so forth, you will determine or seek to determine whether that child is going to be temporary foster care and returned to the parent, or whether this is a child that will eventually be better off for adoption, is that what you mean by a permanent plan?

The Witness: I mean when any child comes into care, it should never be with the thought of the child remaining in foster care permanently. There really isn't any such thing unless it is adoption, so that I feel it must be working toward returning the child to his own home and if this is not possible after every effort has been made to help the family establish a home, then take steps in terminating parental rights.

Q. When you do decide to move a child from a foster home, can you tell the Court what the procedures are, particularly in relation to the foster family and to the [54] child? A. This is always a very slow process, depending, of course, on the age of the child. Even a small child who speaks, a toddler, will be very much involved. The foster parents will know what we are planning, unless there should be a sudden emergency that is beyond our control, but when this is something we are planning, the foster parents would know, the natural parents would know, the child is told, we never just take a child and just move that child.

It is done slowly, with the child having the opportunity of getting acquainted with the people where he is going, and I am putting it that way because where he is going

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might be back to his own family, might be to an adoptive home, might be to another foster home. But it would be a slow process, with the new adults becoming acquainted with the child, with the child visiting in the home, perhaps for an overnight visit. How much contact there would be, how slow it would be would depend on the age of the child, where the child is psychologically, what is best for him.

In many cases we not only make these decisions with the skill of our social work staff, but we have the help of one of our child psychiatrists, one of our consultants [55] who will help us in planning.

Q. When you find a foster home for future placement of a child in that home, is the agreement with the foster family that this is a foster placement for the child to be returned home, if the child is to be returned home, made explicit? A. It is made very explicit. We very carefully differentiate between adoption and foster care and our foster families know that the child is coming to live with them until another—a permanent plan can be made. The length of time we generally cannot spell out.

Q. Once you have decided to move a child and have taken the steps, is in your opinion, it detrimental to the child for undue delay? A. It is, indeed. It would be, it could be very harmful.

Q. In a procedure to review the acts of the child care and the agency by the Department of Social Services or any other body would, in your opinion, it be more effective for there to be an adversary proceeding or would it be helpful to the body that is hearing it, the hearing officer to hear all of the thinking that went into the question of the necessity for moving the child? A. Before I attempt to answer that, I just want to [56] say when I outlined what our procedure is in moving a child, I failed

Florence Creech—for Children—Direct

to include the fact that we must, in accordance with the policy and procedure of the Department of Social Services, and the very large majority of the children under our care in the custody of the Commissioner, and we must send the family what they refer to as the 10-day letter, which spells out the plan to move the child, which also indicates in the letter, it gives the name, the phone number of the person at the public agency whom they can call if they have any question.

The foster parents are asked to sign this letter if they do not have any question, so that it is clearly understood that this is agreed to and, as I mentioned before, Mrs. Bittenwieser, in our statement to the parents of their legal rights, we indicate also their request to the State Department of Social Services so that actually built into the whole procedure there is the possibility of review.

I think that adding anything beyond this which could delay a transfer when it is in the interests of the child, would simply have an adverse effect.

Judge Pollack: Mrs. Creech, one of the points that is made here is that in sending out the 10-day notice, you don't express or specify the reasons for the removal. Are those reasons available to any inquiring foster parent before [57] he gets to the 10-day conference?

The Witness: At our agency, this is certainly discussed with them and before they get to that conference our foster parents all know that if they have any question about what they have discussed with their social workers, they can call me and come in and talk with me or with our associate director.

Florence Creech—for Children—Cross

Judge Pollack: So they don't go into that conference blind. They are in a position to know exactly what your reasons are?

The Witness: Right. They may not agree with the reasons, but they know what the reasons are.

• • •

[59] Q. Mrs. Creech, are the wishes of the children, if they are old enough to be able to indicate their wishes, taken into consideration in reaching a final plan? A. They are indeed.

Q. What criteria do you use for determining whether to remove the child from a home? A. That is difficult to answer because it depends so on each individual case, and I could not use the same set of criteria for any two cases, but I start first of all with a wish to not move a child unless it really is necessary, and weigh everything in accordance with that factor. In other words, there might be certain situations where we might feel that another plan would be better for the child, and yet where we also feel that removal might be so traumatic that we should not move. In other words, it really comes down to the needs of the child, the age of the child, where the child is in relationship to all of the adults in his horizon. What the child's psychological needs are, what movement will mean to a child. In other words, I really cannot say, here is a list that we use. It is much too individual.

• * •

[60] *Cross examination by Ms. Lowry:*

Q. Do you think your agency is outstanding with [61] respect to its practices? A. I appreciate Miss Lowry's

Florence Creech—for Children—Cross

comments. I hope it is outstanding, but I do not agree that we are in such a minority as far as working toward permanent planning for children. I think there are a great many agencies. Perhaps we do a little more, perhaps we have given leadership in that direction, but I think that there is great movement on the part of many, many agencies in permanent planning for children.

* * *

Q. Mrs. Creech, are you aware of a 1971 study that was called Children in Foster Care Who May Need Adoptive Planning that was conducted by the Department of Social Services, Office of Research, which showed that something like a third of all of the children in New York City foster care have been in foster care for over four years despite the fact that they have not been freed for adoption nor had any contact with their parents? A. I am familiar with that, but that was 1971. Since then the 24 month review has come into effect. I think [62] that this review has indeed mobilized a good deal in the field. I am not going to defend agencies by saying I think they should have had legislation for this. I agree in the past not enough was done, but I do not feel that in 1975 we would find the same picture. I think that the public agency, the court and agencies themselves have been moving much more in the direction of permanent planning and I am putting it that way because I think it is all wrong to talk about adoption as the only plan.

On the contrary, I think that not enough has been done in the past and much more should be done in working with families toward returning children to their families so that I keep stressing permanent planning and not adoption.

* * *

Florence Creech—for Children—Cross

[63] Q. Mrs. Creech, are you aware that there are many agencies in New York City that have child care population over 1,000 and 2,000 children, do you know that for a fact yourself? A. Yes.

Q. Mrs. Creech, can you tell us whether or not your agency has any written standards with regard to when a child will be taken out of a foster care home? A. No, we do not have that in writing.

Q. You testified that when the child is to be taken from a foster care home and the foster parent does not sign a waiver, your agency sends it what you call the ten-day letter? A. No. When we are going to move a child, a family always gets a ten-day letter and they then will decide whether they will sign it or not sign it and if they do not wish to sign it, agreeing to it, and indicating that they do want to contact the public officials on this. Then we would postpone taking steps to give them an opportunity of doing so, but everybody has to get the letter.

Q. You testified that the letter contains the reasons on which you are basing your decision—[64] A. I did not say that.

Q. Can you tell me, please, what the letter contains? A. I have a copy of it way in the back that I brought with me if the Court would want to see it.

Q. I don't think we need that.

With regard to the planning parts of the letter, we don't need to see the form you use, but is there a place on the letter for reason for planned removal? A. It is not in the letter. As I explained before, this is handled personally by the social worker.

Q. So the foster parent receives nothing in writing telling the foster parent the reason for the child's removal from the foster home? A. No.

Florence Creech—for Children—Cross

Q. Is that correct A. Generally not. Generally it would be in discussion.

Q. You also testified that your social workers discuss the question of removal with the foster parent ahead of time. A. Yes.

Q. Do your social workers as a matter of practice discuss with the foster parents everything in the file that has led up to the decision to remove the foster child? A. I would say that they certainly discuss everything [65] that is pertinent to the planning for the child. And it would not be just at that point.

In other words, if we are working toward a plan of returning a child to a family, this is being discussed right along and in fact the foster parents would really be participating by the regular visits which generally when we are really—when we are actually making specific plans for return and are working toward a definite date, generally the parents would visit in the foster parent's home so that the foster parents are very much a part of this.

Q. Does the foster parent have access to the agency file? A. No.

Q. May the foster parent read it? A. No.

Q. If they ask to see a specific document in the file and the social worker does not want to give it to them, does the foster parent have a right to see the specific document? A. What document?

Q. If there is, for example, a psychological evaluation of the child in your file. A. It might be show[n] to them. They are always told about it. In fact, when our psychologist sees the child, she also, after examining the child, always talks directly with [66] the foster parent. So that this is not a secret. The foster parent would know the content.

Florence Creech—for Children—Cross

Q. But is it in your worker's discretion to withhold or to share certain information; is that correct? A. I don't think in terms of withholding. I can't think of any instance, frankly, where a foster parent has asked for information specifically about a child, either about the psychological or psychiatric, that we have withheld because likewise, if one of our child psychiatrists see the child, the psychiatrist would also talk with the foster parent afterward.

Q. With regard to other information in the file or with regard to the general content of the file, would you say it is in the social worker's discretion whether to share specific items in the file with the foster parents? A. We do not share the file, as I said. We do not show the file. That's a different question and a specific document which I answered.

Q. Might there be some circumstances that would lead you to believe that it was necessary to remove a child from a foster home which you would not want to communicate to the foster parents? A. There might be. Generally not. I certainly could not say that there never would be.

[67] Q. In a situation in which your plan is to at some point return the child to the natural family and the foster parent has in your estimation become too attached to the child, would it be a possibility that your agency would move the child to a neutral foster home to facilitate the child home? A. We might have to, but we certainly would not do so without making every effort first of helping the foster parents to work this out, to recognize with them how attached they have become, but to help them to accept what the planning is and to make it possible for the child to remain, but if he could not, in other words, as I cited a situation, we have had such a case where the foster par-

Florence Creech—for Children—Cross

ents just absolutely refused any visits of the natural parents and no matter what we did we could not work it out, so we were left with no choice but that would rarely happen.

Generally we would be able to help the foster parents to understand and from my long experience with foster parents, the large majority want what's best for the child. Even though it may be difficult for them and they want a permanent plan for the child and will move in that direction.

Q. Mrs. Creech, do you think that reasonable social work professionals could ever disagree about what is best for a child? A. Yes.

• • •

[69] Q. I have one final question.

Mrs. Creech, have you ever had situation in your agency in which natural parents have sought to have a child returned to them and your agency has felt it was not best to have the child returned? [70] A. Yes.

• • •

[74] Q. When a ten-day letter is prepared for a child, [75] could you explain to the Court exactly what the process is from the time the decision is made by the agency to move the child until the child is removed, in fact removed from the foster home? A. Prior to the ten-day letter there has been discussion way before that with the foster parents, the natural parents, with the child, if old enough, and the foster parents know that they will get the ten-day letter. In fact, they know about the existence of it and have seen a copy of it at the way back earlier when they received a statement from us about their legal rights.

Florence Creech—for Children—Cross

They see a form of that and they are told by the social worker that they will be getting this letter, which they are all prepared for and they also know that they may sign it or not sign it. And the large majority, I think at all agencies, do sign it and the foster parents then participate in what the steps will be, but we don't wait until that ten days. The ten days is only setting the date for the final placement, but the transfer is taking place over a much longer period than that.

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[76] Q. You spoke about something called a 24-month review. Can you describe to the Court what that is?

• • •

[77] Q. Is the foster parent in whose home the child resides at the time the petition is filed notified of the pendency of this proceeding?

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A. They are not notified by the court, but they are notified by our agency and they may participate if they wish to.

• • •

[79] In other words, we look at each case individually and determine whether it would be in everybody's interest, mainly the child's interest or not for the foster parent to be there.

• • •

[82] Ms. Gans: I am Louise Gans, attorney for Intervenor-Defendants.

*Florence Creech—for Children—Cross**By Ms. Gans:*

Q. Mrs. Creech, you testified earlier that ordinarily before a child is returned home there would be stepped up visiting; is that correct? A. Yes.

Q. I want to ask you whether in your experience ordinarily a child that goes home is a child that has had regular contact with its family?

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[83] I would say generally there are regular visits when there is a definite plan toward reuniting the child with the family.

Q. • • • where for some reason there had not been visiting, you would then arrange a period of visiting before the child would be returned home? A. Yes.

• • •

Q. Would it be a typical social work decision in your experience for a child to go home without there having been [84] a period of visiting? A. No. That would be atypical.

• • •

[91] JANE EDWARDS, called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination by Ms. Battenwieser:

Q. What is your position? A. I am the executive director of Spence Chapin Services to Families and Children.

Q. Spence Chapin was originally known as an adoption

Jane Edwards—for Children—Direct

agency. Are they now involved in foster care as well as in [92] adoption? A. Yes. We started out as an adoption agency primarily, but for the last 15 or 20 years we have been a foster care agency and an agency that provides services to families who are not connected with adoption or foster care. A. Is the Harlem Dowling Agency still a part of your agency or separated? A. Yes, it's still part of Spence-Chapin. It's not autonomous as yet, although working towards that end.

Q. You are the director of that agency as well? A. I am.

Q. In order not to waste the Court's time, I will not repeat many of the questions that were asked, but I do want to know if in removing children from foster homes, are you able to work out any set criteria for the removal of children? A. No, I think that it operates pretty much the same as the former witness stated, that so many situations are different and that consideration of the best interests of the child, while that might be paramount, there are other considerations in relation to adoption and the return of children to natural parents that we have to consider.

Q. You have heard the former witness, Mrs. Creech. [93] Is the procedure in your agency the same as she described and if not, will you tell us what the differences are? A. Without having to recall exactly what she said, we do send out—we do have a ten-day notice. We never send it out. We take it out. We either invite the foster family in to hear the reasons for the removal of the child or replacement of the child or we visit the home and take the notice with us there.

Q. Do you consult the child if the child is old enough? A. Yes.

• • •

Jane Edwards—for Children—Cross

[94] *Cross Examination by Ms. Lowry:*

Q. Mrs. Edwards, where do most of the children go who leave a particular foster home who do not go back to the natural parents? A. Most of the children are placed in adoption.

Q. Most of the children placed in care with your agency are either going back to their natural parents or are going to be free for adoption; is that correct? A. That is correct.

Q. To your knowledge, is this situation typical of the situations in other child care agencies in New York City? A. I don't know.

• • •

[95] Q. In the ten-day letter that your agency writes out to the foster parent, can you give us any examples of what is filled in on the blank space provided for the reason why the child is being removed? A. It's stated, return to the mother or placed in adoption. If there is any other reason that has to do with the problem in the foster home, that isn't stated there. We talk to the foster parents about that.

Q. That wouldn't be written out in the letter? A. No.

Q. Do your foster parents who are questioning a decision made by your agency to remove the child, do they have access to your agency records? A. No, they don't.

Q. Does your agency have any written standards with regard to removal of children from foster homes, any guidelines in writing? A. No, we don't have any guidelines as such, but we—in our foster care philosophy and practices statement that every case worker and staff member has, general procedures are stated, such as if you have any questions about how a child is doing in his home,

Jane Edwards—for Children—Cross

the procedure would be to talk [96] with the foster parents about it, talk with your supervisor about it, and the supervisor then talks to her superior and the decisions are made by the administrative staff. Never a decision by one person. And then it's shared, the reasons are shared with the foster parents.

Q. Miss Edwards, are there any situations in which a child who is free for adoption has formed a bond with the foster parents and the foster parents do not want to adopt the child? A. Yes, unfortunately we have many such situations like that.

Q. What are your guidelines with regard to handling such a situation? A. We have had some success when we continually talk with the foster parents about adoption. We point out to them the value it would have for the child. And sometimes the child himself even asks the foster parents to adopt.

We bring the foster parents into meetings with other foster parents who have adopted, so they can tell them about the experience. We bring in officials from the State and from the City to help with any questions they may have about the subsidy, whether it will last or not. We talk with them about the psychological effects of having a child in the home who is free for adoption and would have to be [97] removed to another home for adoption if he has been there a long time and wants to stay there and everything is fine in that home. • • •

• • •

Q. Do you ever remove a child from a specific foster home without a specific order from a 392 hearing? A. You mean to return to the natural mother?

Q. Either to return to the natural parent or to move elsewhere. [98] A. We rarely wait for the 24-month re-

Jane Edwards—for Children—Cross

view if in our opinion the best interests of the child dictate us to move the child from the home, either for adoption or return.

Q. When a natural parent asks for a child back, does your agency always give the child back? A. No, not always.

Q. Are there any circumstances in which you think the child's interests differ from the natural parents' interests? A. Yes. We have situations where we think that the natural parent has an interest in the child, has maybe shown an interest in the child in visiting, but that based on opinions from other disciplines, who is emotionally able to care for that child and it's in his best interests to remain where he is or to be placed elsewhere.

And if we feel that way, then we go to the court to free the child or to make an effort to free the child for adoption.

Q. Are you able to form an opinion with regard to in general the nature of foster family relationships?

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A. We have a very positive opinion about foster [99] family relationships. We work very hard to make those relationship[s] very close so that the child will have, while he is in the foster home, good care and close care and if it's necessary for the child to remain in the home for a long period of time, then his best interests would be served.

Also if it's not possible for him to be returned to his natural parent or placed in an adoptive home outside of the foster home, working in a family centered way with the foster parents and bringing—helping to bring about a close relationship, benefits the child in maintaining a home for him that will be a personal one.

Jane Edwards—for Children—Cross

Q. Have social workers assigned to your agency ever disagreed with regard to what might be best for a particular child? A. Yes.

Ms. Lowry: Thank you.

Judge Lumbard: How many children do you have under your supervision?

The Witness: We have 1,300 children.

Judge Lumbard: That would make you one of the largest agencies?

The Witness: Yes, it does.

• • •

[101] A. Foster care is a temporary plan for a child to act in substitution for his natural family until his natural family is ready to take him back and able to take him back or until he is freed to be placed in adoption and thereafter it is the obligation of the agency to continue to try to find a permanent adoptive home for him if that is in his best [102] interests.

However, as I said before, when he gets to be 12 or 13, and this is the only home for him, then the best interests of the child then have to be taken into consideration.

For some children it might be adoption outside the home. For many of them it is not. And that's where—it's not really foster care after that. It's a permanent foster home different from a temporary one.

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[105] *Cross examination by Mr. Hoffman:*

Q. • • • once you have a natural parent in the picture, it's the fitness of that parent, the ability of that parent

Jane Edwards—for Children—Cross

as opposed to whatever is happening in the foster family that's the determining factor as to whether the child goes back? A. Not by itself. That's not the way you stated it at first. That's not the only factor that's taken into consideration, whether the mother is fit or not.

[106] Does she want the child? And how often has—how has she demonstrated wanting the child, being able to care for the child, though she may be perfectly fit herself in managing her own life and how will she be as a parent? What dangers may we be subjecting the child to, which has nothing to do with the quality of care he has had in the other place, because if he hasn't had, for example, good quality care in the foster home where he is, * * *

Q. The decision to return the child to a natural parent, is that a carefully arrived at decision? A. Very carefully.

[107] Q. Sometimes it takes a period of months before the decision is actually made? A. Sometimes it does, yes.

Q. Sometimes it takes even a longer period of time? A. Sometimes it takes years.

* * *

Cross examination by Ms. Gans:

[109] Q. * * * after the 24-month review, if the court gives you an order to free the child for adoption, you feel bound by that? A. Yes.

Q. Or if the court gives you an order to return the [110] child? A. Yes.

Q. Or if the court gives you an order to keep the child in its current foster home, you feel bound by that? A. Yes. And if we disagree, we go back to the court to ask for a change in the disposition.

* * *

Jane Edwards—for Children—Cross

[123] Q. Do you feel that subjecting natural parents to an adversary hearing or an attack by them in an adversary hearing prior to the return to them of their children might deter some of them or weaken their resolve to get their children back? A. No.

* * *

CHRISTIANE GOLDBERG, called as a witness, being first duly sworn, testified as follows:

* * *

[124] *Direct examination by Mr. Bienstock:*

* * *

Mrs. Goldberg, do you live in New York City? A. Yes.

Q. You live in Brooklyn, don't you? A. Yes.

Q. Are you and your husband Ralph Goldberg plaintiffs in this action? A. Yes.

Q. Are you and your husband foster parents? A. Yes, we are.

Q. Since when have you and your husband been foster parents? A. We have been foster parents for five and a half years.

Q. Under what agency are you authorized— A. Under the Bureau of Child Welfare.

Q. That is a City agency? A. Right.

[125] Q. Do you have any children of your own? A. Yes, a daughter.

Q. One daughter? A. Yes.

Q. And her age? A. She is nine.

Christiane Goldberg—for Plaintiff, Foster Parents—Direct

Q. Could you tell the Court why you and your husband became foster parents?

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A. Because we like kids. Because we like a big family and because there was a need for foster parents.

Q. Do you and your husband have a foster child now?

A. Yes, we do.

Q. Is that— A. That is Rafael.

Q. How old is he? A. He is twelve.

Q. How long has he been your foster child. A. He has been with us for five and a half years.

Q. Could you relate to the Court under what circumstances Rafael became your foster child? A. It was supposed to be an emergency placement. [126] He came to us on an emergency basis because his foster mother needed to take a vacation and she would not take him along and they needed a place for him for two weeks until she would come back.

• • •

A. He had been described to us as mentally retarded, hyperactive, brain-damaged and emotionally disturbed. The other thing we knew that he had a lot of tantrums.

Q. He had a lot of what? A. Tantrums and that's about all.

Q. Can you describe Rafael's behavior during the first several years he was in your home as your foster child?

A. He did have a lot of tantrums. He was very active. He could not be left alone for even one minute from the time he woke up until the time he went to sleep. He would wake up around five o'clock in the morning. He could not play a game with other kids, he could not play cards or

Christiane Goldberg—for Plaintiff, Foster Parents—Direct

be occupied with toys, he didn't know what to do with cars [127] except bang them and crash them. He had tantrums every time we asked him something.

The only thing he really knew how to do was to fight.

He had two fears. One of them was that when he wakes up the next morning I would be dead because my husband would have killed me with a knife, and the other fear was that he would be taken away. The first fear, we talked about it and after that he woke up a little later in the morning and that made it easier for us.

The second fear, we had to deal with it. We had to tell him that we would not send him away.

Q. Mrs. Goldberg, can you describe Rafael's behavior over the last several months up until the present time?

A. Well, he is much better. In the beginning we used to have to sit with him and do home work with him every evening from 4:30 until 7:00. Now he is able to do that almost by himself. He, for the past few months, started to have a few friends. Those are still loose friendships but it is still kids he can relate to, and that he can play with and he doesn't have that many fights any more, and he is able to play. He is a good athlete. He knows how to swim and he is on hockey and baseball and football teams, and that kind of thing.

[128] Now he begins to feel that he can do things and that things are worth trying because maybe he will succeed, which is something that he didn't do before.

Q. Mrs. Goldberg, do you and your husband receive money for Rafael's care from the Bureau of Child Welfare? A. Yes.

Q. Do you and your husband also spend money of your own for Rafael? A. We don't keep different accounts for different members of the family. We don't keep track of we spend this for this—this much for this one and this

Christiane Goldberg—for Plaintiff, Foster Parents—Direct

much for that one. If everybody goes some place, then it is paid for everybody and if somebody needs something, then he gets it.

And when he needed a special school, we put him in the Montessori School.

Q. And the BCW reimbursement did not cover the cost of the Montessori School?

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A. We put him in the Montessori School. We paid for the tuition. We paid on time as the school wanted us to pay and we got reimbursed for some of it.

Q. Did your family take Rafael with you on family [129] visits and on family trips? A. Yes.

Q. Is Rafael treated in sum as an equal member of your family? A. He certainly is.

Q. Mrs. Goldberg, are you a member of any foster parent organization? A. Yes.

Q. Are you an officer in a foster parent organization? A. Yes, I am.

Q. Do you know of foster children who have been removed from their foster families without written notice to those families? A. Yes, I do.

Q. Approximately how many in your knowledge? A. I would say I know about ten or twelve cases.

Q. Over what period of time? A. Over maybe a year or a year and a half.

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[130] Q. Have you or your husband ever received written notice that the Bureau of Child Welfare is planning to remove Rafael from your home? A. No.

Q. You have not? A. Not written.

Christiane Goldberg—for Plaintiff, Foster Parents—Direct

Q. Are you concerned that the Bureau of Child Welfare might remove Rafael from your home? A. Definitely. It is like a sword hanging over our heads.

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Judge Pollack: Why are you concerned? What is it that they have done that leads you to believe that they have any intent to remove the child?

The Witness: The worker has spoken about it.

Judge Pollack: What has she said and why? What reason has she given?

[131] The Witness: We never received any reason.

Judge Pollack: Did you ask for a reason?

The Witness: We never got any.

Judge Pollack: You didn't ask for one either, did you?

The Witness: I think we did.

Judge Pollack: What did the worker tell you as to the possibilities of removing the child, for what reason? Was it because of the child's health?

The Witness: We got a letter from one of the supervisors saying we were doing a wonderful job.

Judge Pollack: What occasion was there to notify you that the child might some time be removed? Who said something?

The Witness: Every worker had essentially a different plan. Every time we change workers, they had a different opinion. Even the last worker first said he wasn't going to move him and then he said he was.

Judge Pollack: You got no reasons for it, is that it?

Chistiane Goldberg—for Plaintiff, Foster Parents—Cross

The Witness: Right.

Judge Pollack: And nobody has taken any steps to remove your child, have they?

The Witness: Well, we objected.

[132] Judge Pollack: And that ended it?

The Witness: I don't know what the worker has in mind.

Cross-examination by Mr. Hoffman:

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[134] Q. Talking about the last year or so, this particular controversy, when were you first informed that Rafael would be taken out? I don't mean going back five years ago, four years ago when it might have been discussed as a possibility. Were you actually informed that they are about to take him out within the last year or so? A. When he told that to the Judge at the 392 hearing.

Q. The 392 hearing they told the Judge that they [135] might be taking Rafael out.

Q. Do you plan to adopt Rafael? A. We have a commitment to him and to the agency that we want to keep him and raise him. We made that very clear to each one of the workers. We had to make that clear to Rafael from the beginning because it was a crying need of Rafael. He was constantly asking, are you going to throw me out, are you going to call the worker, and we had to reassure him constantly that no, we were not going to take him out, throw him out, that we were going to keep him.

Q. Is Rafael, to your knowledge, free for adoption? A. Not to my knowledge.

Q. If Rafael were free for adoption, would you be willing to adopt him? A. He is not free yet.

Chistiane Goldberg—for Plaintiff, Foster Parents—Cross

Q. I said if Rafael were free for adoption. A. I don't know. He has his own identity. We wish to respect his identity, his past, his sense of belonging to where he comes from.

[136] Q. So if the agency were to undertake to free Rafael for adoption, assuming for the minute that he isn't free, would you be willing to assist the agency— A. No, I don't think he should be cut off from his original family.

• • •

[140] Judge Pollack: When was the 392 hearing held, what month?

The Witness: April or something.

Judge Pollack: April of 1974?

The Witness: Yes.

[141] Q. Were you present at the 392 hearing? A. Yes.

Q. And were you permitted to speak and offer what position you wanted to offer? A. Yes.

Q. And were you apprised prior to the 392 hearing that such a hearing would be held? A. Were we apprised that there would be a hearing?

Q. That's right. A. Yes.

Q. Was there a disposition made by the judge, if you know, at the 392 hearing? A. He said foster care continue.

Q. Was there any other provision of that order? A. He said that visits should be set up if the child wanted it.

• • •

Dorothy Lhotan—for Plaintiff, Foster Parents—Direct

[144] DOROTHY LHOTAN, called as a witness, being first duly sworn, testified as follows:

[145] *Direct examination by Ms. Lowry:*

Q. Where do you live, Mrs. Lhotan? A. Hicksville, Long Island.

Q. Are you a plaintiff in this lawsuit? A. Yes, I am.

Q. Are you a foster parent? A. Yes, I am.

Q. How long have you been a foster parent? A. Fourteen years.

Q. For which agency have you been a foster parent? A. Social Services of Long Island.

Q. Is that the Nassau County Social Services? A. Nassau County.

Q. Do you have any children of your own? A. Yes, I have.

Q. How many children do you have? A. I have three.

Q. How old are they and what do they do? A. I have a student 17. I have another son that's 27 and I have on that's 30.

Q. What do your children do, the ones who are not students? [146] A. They are police officers.

Q. Why did you and your husband become foster parents? A. Because we love children very much.

Q. Do you presently have any foster children in your home? A. Yes, I have.

Q. What are their names? A. Cindy, Cathy, Cheryl and Patty.

Q. How old are they? A. Eight, nine, eleven and twelve.

Q. When did the girls come to live with you as foster children? A. Cheryl and Patty came 1970, September. Cindy and Cathy came to my house September 1972.

Dorothy Lhotan—for Plaintiff, Foster Parents—Direct

Q. Do you have any other foster children in your home?

A. At the present time?

Q. At the present time. A. No, I have the four.

Q. How many other foster children have you had before the Wallace children? A. Six.

Q. How long did each of them stay with you? [147]

A. One, two and three years.

Q. Where did each of them go when they left your home? A. Back to their parents.

Q. Each of them went back to their parents. A. Yes.

Q. Did you ever express any objections about any of these children leaving your home? A. No, I didn't.

• • •

Q. Why didn't you express any objections about these children leaving your home? A. Because they went back very happy.

Q. Do you receive money for taking care of the Wallace girls? A. Yes, I do.

Q. Do you spend any of your own money on their care? A. Definitely.

Q. Do the girls participate in family activities? [148] A. Yes, they do.

• • •

Q. To what extent do they participate in family activities? A. We go to church together. We get together as other families. We go on vacations together. They do very well in school.

• • •

Dorothy Lhotan—for Plaintiff, Foster Parents—Direct

Q. During the time the children have been in your home, have you had any contact with the workers from the Nassau Department of Social Services? A. Yes, I did.

Q. Approximately how many workers if you know, have you had contact with from the Nassau Department? A. Three.

• • •

[149] Q. Have any of these workers who have had contact with you complain to you about how the girls were doing in your home prior to June of 1974? A. No.

Q. In June of 1974, were you asked to go to the Childrens Bureau? A. I did.

Q. For what reason? A. The supervisor, Mrs. Mays, had called me on the phone and she didn't tell me for what reason.

Q. What happened when you went there? A. When I got there, she had given me a paper to sign which I had objected and she also had said that they are going to be removed from the home July 9th and if they don't want to come with us, we are going to drag them out.

Q. Was that the first time, Mrs. Lhotan, that you heard about any plans to take the children out of your home? [150] A. Yes.

Q. Were you told the reason at that time? A. Because we loved them too much. They loved us too much.

• • •

Q. Yes. At the time you had the conversation with Mrs. Mays, you testified she gave you a paper to sign, were you told by Mrs. Mays that you had any right to object to the girls being taken from your home? A. No.

Dorothy Lhotan—for Plaintiff, Foster Parents—Direct

Q. And she gave you a paper to sign? A. Yes, she did.

Q. Did you sign the paper at that time? A. No, I didn't.

Q. What happened after the meeting? A. After the meeting we had come home very upset about the whole issue and June the 28th we had gone to church as a family and I had met the priest and the priest had given me a telephone number of Flora.

• • •

A. And she had recommended me to Marcia.

[151] Q. Mrs. Lhotan, you have had foster children before. Why are you objecting in this instance to having the children removed?

• • •

A. Because there was never—if there were just a few visitings. The mother never came to visit these children. She had called me up a year ago, two years ago on the phone stating, wanting to talk to the children.

At the time the children weren't there, they were in the park. I had asked her, call back at 6:00, dinnertime. I'll make sure they are there. She says, all right.

I had kept the children indoors, I wouldn't let them out thinking she was going to call. She never called.

I haven't heard and I haven't seen the mother since then.

Q. Mrs. Lhotan, to your knowledge have any of the girls been asked by the workers at the Nassau Children's [152] Bureau how they feel about leaving your home? A. No.

• • •

[157] Q. Could you tell us what Mrs. Mays said to you exactly when you went in there? A. She had told me that she had already discussed it with the staff, that even if

Dorothy Lhotan—for Plaintiff, Foster Parents—Cross
Cheryl Lhotan—for Plaintiff, Foster Parents—Direct

we didn't sign, the children would still be dragged out of our home and I had asked them how many are coming for the children and they said, one won't be enough. There has to be a few of them coming.

My husband asked them, how many cars. She had stated two cars. There wouldn't be enough with one car.

[161] *Examination by Ms. Gans:*

Q. Mrs. Lhotan, * * * Isn't it true that there was a foster care review proceeding concerning the Wallace girls in 1972? A. Could you explain that a little more clear.

Q. Did you go to Family Court after you had the two older girls for two years, was there a hearing in Family Court? A. Yes.

Q. And you were there? A. Yes.

* * *

[162] Q. * * * the hearing was about all the six children at the time? A. Yes.

* * *

[164] CHERYL LHOTAN, called as a witness, being first duly sworn, testified as follows:

* * *

[165] *Direct Examination by Ms. Lowry:*

Q. Cheryl, tell the Court how old you are? A. Twelve.

Q. Cheryl, do you understand what it means to [166] tell the truth? A. Yes.

Q. Do you understand you are under oath now and you have to tell the truth? A. Yes.

Cheryl Lhotan—for Plaintiff, Foster Parents—Direct

Q. Do you know why you are here now, Cheryl? A. Yes.

Q. Do you know that the Nassau Childrens Bureau wants you and your sisters to leave your foster home, is that right? A. Yes.

Q. Has anyone from the Childrens Bureau asked you whether you want to leave? A. No.

Q. Has anyone asked your sisters, if you know? A. No.

Q. Do you have an opinion about whether you want to leave or not?

* * *

[167] A. Yes.

Q. Do you want anybody to ask you? A. Yes.

Q. Why is that? A. Because we were supposed to be taken away from our foster parents without any say.

Q. Do you consider it important to have a say in whether you go or not? A. Yes, I do.

* * *

Ms. Gans: Your Honor, I would like to call Naomi Rodriguez.

Mr. Bienstock: Your Honor, at this time the plaintiffs would like to make an objection to what I believe is going to be an across the board objection to each of the witnesses offered by Mrs. Gans. * * *

[169] We wanted to show to the Court the following, which is related to our view of the foster care system as a whole. When a parent voluntarily, and we are talking about voluntary foster care. When a parent voluntarily places her child in foster care, she signs a form which authorizes the Commissioner of Social Services, a public [170] official,

Colloquy

to care for her children. She does not authorize any private individual to care for her foster children.

• • •

We want to show what the significance of one year is in terms of a mother who has a child in foster care [171] because it is our position that since she has never been told that she must get her child out of foster care in one year or else, that in fact the change in rights and expectations would be penalizing the parent, who sees her child and wants her back, for delays and processes which are beyond her control, so we wanted to show the Court through two witnesses how it is possible to have a child in foster care for a year without there meaning or signifying in any way any kind of abandonment.

• • •

[172] Ms. Gans: I do think it is in dispute. The consequence of conferring on foster parents the kinds of rights which they seek, it is not a question of the [173] hearing alone. They are asking for recognition to status as parent—

Judge Pollack: That's a matter of law, isn't it, and the philosophy of the state.

Ms. Gans: According to plaintiff it is a matter of psychiatric evidence.

Judge Carter: You can't establish anything like that by the natural parents, can you?

• • •

Naiomi Rodriguez—for Intervenor Defendants—Direct

[175] Ms. Gans: I also have a witness who had a child in foster care and the child has been returned to her and I wanted her to testify about her experience with foster care and about the reuniting of a family.

Judge Pollack: How does that prove that there has been or has not been due process? This is a federal court convened to determine whether or not a statute gives due process and equal protection of the laws and you are going to have a lady say, I had a child in foster care and she was returned to me.

Ms. Gans: But the preliminary inquiry, as I understand it, is is there a constitutional right or protected interest that—as hard as I have tried, that [176] inquiry involves questions of policy. It involves questions of how does the foster care system work.

• • •

[NAIOMI RODRIGUEZ]

[179] *Direct Examination by Ms. Gans:*

Q. Mrs. Rodriguez, are you the mother of a child Edwin Rodriguez? A. Yes.

Q. Did you place Edwin in foster care in March 1973? A. Yes.

Q. Did you do it by signing a form? A. I did it by signing a form.

Q. Was the form read to you? A. Yes, it was.

Q. Did you mark— A. Yes.

Q. How did you mark your name? A. I don't mark my name. I do an X. I make an X.

• • •

Naomi Rodriguez—for Intervenor Defendants—Direct

Judge Lombard: Everybody agrees this is the form executed by the witness.

Q. Mrs. Rodriguez, did you ever have any hearing concerning your children after you placed them in foster [180] care? A. No.

• • •

Q. You placed your child in foster care in March 1973. What agency is your child with? A. The Harlem Dowling.

Q. When did you ask for your child back? A. I gave them a period of six months.

Q. When did you actually ask to have your child back? A. After the six months were over.

Q. Was your child returned to you? A. No.

Q. Was there any kind of hearing held? [181] A. No. No kind. No definite answer. It was just absolutely refused.

Q. Were you advised that you could go to a lawyer to ask for the return of your child?

Mr. Bienstock: Your Honor, at this point I must object. • • •

• • •

[182] Judge Lombard: Has the child been returned yet?

Ms. Gans: No, the child has not been returned.

• • •

Judge Lombard: There is no dispute about those issues. There is no need to take the time of the Court and all the other people here assembled to develop matters as to which there is no dispute.

• • •

Colloquy

[183] Ms. Gans: May I just, with all due respect to the Court, simply state on the record that I feel that I have a right, that I am entitled on behalf of my clients who are the parents of children in foster care and that would be the story of their individual case.

There has been much talk about abandonment, you see. My clients placed their children in foster care because of illness or other crises. I want the testimony on that. I wanted testimony on parents who maintain regular contact when they have their children in foster care. • • •

• • •

[184] I also wanted to offer evidence of a mother and child who have been reunited after foster care placement and talk about their adjustment, because the suggestion implicit in plaintiffs' case is that after one year the relationship between the foster parents and child is so intense that it must not be broken, that that is the relationship which now should be preserved and I thought it would be appropriate to hear from a mother and child who have been reunited after a separation to see how they are doing.

SEP 4 1976

MICHAEL ROBAK, JR., CLERK

In The
Supreme Court of the United States
October Term, 1976

76-180 HENRY SMITH, *etc., et al.*, *Appellants-Defendants.*
--against--

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc., et al.*, *Appellees.*

76-183 BERNARD SHAPIRO, *etc., et al.*, *Appellants-Defendants.*
--against--

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc., et al.*, *Appellees.*

76-5193 NAOMI RODRIGUEZ, *etc., et al.*, *Appellants-Intervenors.*
--against--

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc., et al.*, *Appellees.*

76-5200 DANIELLE and ERIC GANDY, *etc., et al.*, *Appellants-Plaintiffs,*
--against--

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc., et al.*, *Appellees.*

On Appeal from the United States District Court
for the Southern District of New York

MOTION TO AFFIRM

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FOR EQUALITY AND REFORM, etc.,
et al.,

Appellees.

On Appeal from the United States
District Court for the
Southern District of New York

MOTION TO AFFIRM

Appellees Organization of
Foster Families for Equality and Reform,
Madeline Smith, Ralph and Christiane
Goldberg, George and Dorothy Lhotan, and
the class of foster parents they repre-
sent* move, pursuant to Rule 16 of the
Rules of the Supreme Court of the United
States, that the final judgment and decree
of the District Court be affirmed on the
grounds that the questions raised by the
decision below are so insubstantial, and
the decision below so plainly correct as
not to warrant further argument.

Questions Presented

1. Was the District Court's
decision, holding that the New York State
statutes and regulation authorizing the
peremptory removal of foster children
from foster homes without a prior
hearing violate the due process rights
of foster children, clearly consistent
with this Court's interpretation of the
due process clause of the Fourteenth
Amendment?

2. Did the District Court have
jurisdiction to recognize the constitu-
tional rights of foster children, and to
fashion relief accordingly, when the
only arguments in support of such rights
were advanced by appellee foster parents?

* Opinion of R.L. Carter, U.S.D.J.,
A. 42a-50a.

Statement of the Case

The named appellees in this civil rights class action are foster parents who, for more than one year, have cared for children placed in their homes by authorized child-care agencies* in the State of New York. In conjunction with an organization of foster parents, they filed suit on their own behalf, on behalf of other foster parents, and on behalf of the foster children for whom they care, asserting that New York Social Services Law §§383(2) and 400, and 18 New York Code Rules and Regulations §450.14,** the provisions governing the removal of foster children from foster homes, violate the due process and equal protection*** clauses of the Fourteenth Amendment.

* The term "authorized child-care agencies" refers to an agency authorized by the New York State Board of Social Welfare, pursuant to New York Social Services Law §371(10), to place and supervise children in approved foster homes, and includes both voluntary child-care agencies, such as the Catholic Guardian Society, and public agencies, such as the Nassau Children's Bureau.

** Since renumbered and hereinafter referred to as 18 N.Y.C.R.R. §450.10

*** The district court did not reach appellees' equal protection claim, A., 20a.

The circumstances surrounding the initiation of this lawsuit by appellee Madeline Smith are typical of the abuses which could occur and which have occurred under the procedures declared unconstitutional by Judge J. Edward Lumbard, writing for the district court in this case.

Mrs. Smith, a widow whose only child had died, became a foster parent under the supervision of Catholic Guardian Society, after making clear to the agency that she wanted to care for children who had no family of their own. (R., Second Amended Complaint, ¶23) Eric and Danielle Gandy, then four and two years old respectively, were placed with Mrs. Smith as foster children in February, 1970. It is undisputed that Danielle has never seen her mother and Eric does not remember her. (A., p. 6a) Both children regard Mrs. Smith as their mother and Mrs. Smith has repeatedly expressed her desire to adopt the children. (R., Second Amended Complaint, ¶27) In 1974, a new worker assigned to the family by Catholic Guardian Society notified Mrs. Smith that Eric and Danielle were to be removed from her home. Appellees alleged and appellants did not deny that the agency planned to move Eric and Danielle to an agency-operated boarding home. Mrs. Smith received a written notice of the planned removal which stated only that the children were to be removed because "to continue to plan for Eric and Danielle, it is now in their best interests to leave your home. . ." (R., Second Amended Complaint, ¶30) The only review of this decision available to Mrs. Smith prior to Eric and Danielle being taken

from her home was the conference provided by 18 N.Y.C.R.R. §450.10, in which she would not have an opportunity to present or cross-examine witnesses or inspect agency records but would have the burden of submitting "'reasons why the child should not be removed.'" (A., p. 4a) Only after Eric and Danielle had been separated from the only family they knew would Mrs. Smith have been able to obtain an administrative review of the removal decision, in accordance with 18 N.Y.C.R.R. §450.10 (c) and New York Social Services Law §400.

Mrs. Smith filed this action on her own behalf and on behalf of Eric and Danielle Gandy on May 9, 1974. The removal of the Gandy children without a prior due process hearing, scheduled to take place on May 10, 1974, was temporarily enjoined by the district court on May 9, 1974, and that injunction was continued until dissolved during the course of this litigation, based on a representation that the agency had changed its plans about removing the Gandy children from their home with Mrs. Smith.

As of this date, Eric and Danielle continue to live with Mrs. Smith, under the supervision of a different Catholic Guardian Society worker, and Mrs. Smith has initiated legal action to adopt Eric and Danielle.

It is the procedures which would have permitted the ill-conceived and peremptory removal of Eric and Danielle Gandy from their home with Mrs. Smith, without a prior due process hearing, which have been declared unconstitutional by the court below.

A. The Procedure

The procedure for removing children from foster homes is summarized in the opinion of the district court, Appendix "A," p. 4a. New York Social Services Law §383(2), A., p. 51a, vests total discretion in a child-care agency to decide when and under what circumstances a child should be removed from a foster home under the agency's supervision. The decision is made initially by a worker who need not have any special training in social work or psychology* and who might be the third, fourth, or tenth worker on the case.** The foster child, regardless of age, need not be consulted about the decision to sever the bonds of what may be the only family he or she has ever

* R., Brennan dep., pp. 4,6.

** Appellee Dorothy Lhotan testified that during the four years she had the Wallace children in her home, she had had three different caseworkers. R., hearing tr., p. 148.

Appellee Christiane Goldberg, whose foster child had been placed with her five and a half years ago on a temporary basis, testified:

"Every worker had essentially a different plan. Every time we change workers, they had a different opinion. Even the last worker first said he wasn't going to move him and then said he was." R., hearing tr., p. 131.

known.*

The district court found that the removal procedure operated in the following manner:

"The present statutory scheme, applicable throughout most of the state, [fn. omitted] provides that the local public welfare department or an authorized private agency acting on its behalf [fn. omitted] may, in its discretion and on 10 days notice, order the removal of any foster child from the foster home in which he or she has been placed. Social Services Law §383(2) and 400. After having been informed of the impending removal in a printed notice which contains no space for any detailed elucidation of the reasons for that removal, the foster parents may request a conference with a 'public official' of the local social services department at which they have an opportunity to express their dissatisfaction with the agency's decision but

* Twelve-year-old Cheryl Wallace, a foster child of appellees Lhotan, testified that neither she nor her sisters had been asked whether they wanted to leave their foster home prior to the time that the Nassau Children's Bureau notified the Lhotans of the agency's decision to remove the children. R., hearing tr., p. 166.

no formal manner is provided whereby they may contest it. N.Y.C.R.R. §450.14.

"Although the foster parents may be accompanied to the conference by 'a representative,' they may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit 'reasons why the child should not be removed.' The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R. §450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision." A., pp. 4a-5a.

Judge Lumbard found that the procedures were inadequate to fulfill a "data-gathering function," (A., p. 12a), and concluded, "Such a scheme fails to satisfy even the most minimal requirements of procedural due process." (A., p. 12a)

The challenged statutes and regulation do provide for full administrative review - but that review is available only after the child has been removed from the foster home. New York Social Services Law §400(2), 18 N.Y.C.R.R. §450.10(c). Judge Lumbard flatly rejected

the state's argument that any constitutional defects in the removal procedures could be cured by the availability of a post-removal "fair hearing." (A., pp. 12a-13a)

B. Foster Care in New York

Appellants, in their jurisdictional statements, have urged the Court to give plenary consideration to this case, based in part on the argument that foster care is a "temporary" arrangement and therefore does not create interests or relationships which warrant due process consideration or, in any event, are adequately protected by the challenged procedures,* and that the district court erred in holding otherwise. While that may be the theory of foster care, it is clearly not the reality in the State of New York, as the district court recognized, pointing out that "[t]he median length of stay for dependent and neglected children in foster care at the end of 1973 was 4.38 years." (A., p. 18a)**

* Jurisdictional Statements, Appellants-Intervenors Rodriguez et al., p. 8; New York City Appellants, p. 33; Appellants Shapiro and Lavine, p. 5.

** Jane Edwards, the director of a voluntary agency responsible for 1300 children, acknowledged that even children which the agency itself recognized to be in a "permanent foster home," a home in which the child might have lived for twelve years or more, could still be removed from that home at the agency's discretion, under the challenged procedures. R., hearing tr., p. 99.

Moreover, children in foster care are likely to be shifted from one foster care setting to another, with only a small percentage of the children removed from a foster home being removed for a return to a natural parent* and almost 60% of the children in one study experiencing more than one placement, and almost 30% being moved three or more times.**

The consequences of such disruption to the emotional well-being of children who have already suffered the initial disruption of leaving their natural family*** cannot seriously be disputed.

"Plaintiffs' experts assert that continuity of personal relationships is indispensable to a child's well adjusted development. We do not need to accept that extreme position to recognize, on the basis

* R., Answers of state defendants Lavine and Shapiro to plaintiffs' interrogatories, Aug. 12, 1974; R., dep. of Prof. David Fanshell, pp. 113, 119, Exh. A and B, p. 161.

** R., dep. of Prof. David Fanshell, p. 124, Exh. A.

*** "By far the most common conditions prompting admission to foster care are neglect and abandonment of dependent children by their parents." Program Analysis Report No. 56, October, 1974, "Time Spent in Care by Children Served in the New York State Foster Care Program 1973," prepared by the New York State Department of Social Services, p. 13, R., dep. of Robert Catalano, Exh. B., p. 5.

of our common past, that the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parents." A., p. 11a

The three judge district court heard one full day of testimony and had before it almost 1,000 pages of depositions from psychiatrists, social scientists, public officials and employees, concerning the realities of foster care in New York and its impact on children.

Appellees presented the testimony of three distinguished psychiatrists specializing in child and adolescent psychiatry, all of whom have had experience treating foster children and all of whom testified that unnecessarily removing a child from a foster home could cause permanent psychological damage. R., Dr. Marie Friedman, hearing tr., pp. 12, 13, 14, 16, 17; depositions of Dr. Albert Solnit, pp. 14, 23, 25, 26, 27, and Dr. Stella Chess, pp. 24-26.

The court relied on this evidence, its knowledge of "our common past," and the principles and standards upon which the federal courts have interpreted the due process clause of the Fourteenth Amendment, to reach the conclusion that

"the pre-removal procedures presently employed by the state are constitutionally defective."*

ARGUMENT

Taken together, the contentions of appellants can be briefly summarized:

1) There is no interest worthy of constitutional protection in the relationship between a foster child and a foster family;

2) Even if such a constitutional protection could be implied from earlier Supreme Court rulings, recent decisions have narrowed the zone of interests to be accorded due process protection;

3) Even if the New York procedures violate the due process rights of foster children, the district court was without jurisdiction to reach such a conclusion.

These contentions are clearly incorrect.

* A., p. 9a.

POINT I

THE DISTRICT COURT ACTED
IN ACCORDANCE WITH BOTH
TRADITIONAL AND RECENT DUE
PROCESS STANDARDS IN DE-
CLARING THE NEW YORK PRO-
CEDURES UNCONSTITUTIONAL.

The district court held that foster children have a constitutional right to freedom from "arbitrary or misinformed action"* with regard to removal from a foster home in which they have lived for over one year. The basis for such a right is obvious: "the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent."** Whether the right is viewed as being based on the concept of a state-provided benefit *** or on the concept of

* A., p. 10a.

** A., p. 11a.

*** Regardless of whether the state has an obligation to act, when it chooses to act it must do so in a fair and non-arbitrary manner. The State of New York has chosen to provide children for whom it has assumed responsibility with the benefit of living in a foster home and forming a relationship with adults the state has approved as suitable foster parents. Removal of a child from a foster home in which the child has lived for a year or more, and in which the child is likely to

[fn. cont'd p. 15]

liberty* is not crucial. Goldberg v. Kelly, supra, 397 U.S. at 262; Shapiro v. Thompson, 394 U.S. 618 (1969).

Both the dissenting opinion** and appellants' jurisdictional statements have blurred together both stages of the two stage process necessary for a due process inquiry: 1) whether a protected right is infringed by the state and, if so, 2) whether the procedures available are adequate in view of the nature of the deprivation. Goss v. Lopez, supra, 419 U.S. at 576, citing Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969); Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971); Board of Regents v. Roth, supra, 408 U.S. at 570, n. 8. Judge

[fn. cont'd from p. 14]

have formed a relationship of some significance to the child, (R., depts. of Dr. Solnit, pp. 13, 15, 22; Dr. Chess, p. 65) constitutes a withdrawal of a state-provided benefit. The withdrawal of a state-provided benefit cannot be arbitrary and has repeatedly been accorded due process protection. Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Perry v. Sindermann, 408 U.S. 593 (1972).

* "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572 (1972). See also Goss v. Lopez, 419 U.S. 565 (1975); Palko v. Connecticut, 302 U.S. 319, 325 (1937).

** A., p. 21a.

Lumbard, writing for the district court, properly looked at the nature and manner of the loss and found that it gave rise to constitutional protection. The court then evaluated the degree of the loss, weighed the adequacy of the existing procedural safeguards and evaluated the governmental interest at stake to come to the conclusion that the procedures were inadequate, and could not be cured by the availability of full review after the harm had taken place.* The district court also evaluated the procedures implemented by New York City subsequent to the commencement of this litigation, and found them to be inadequate to protect the rights of the foster child. The court based this holding on its conclusion that a foster child has a right to be protected from all precipitous or uninformed decisions, even if the uninformed decision results in a return to a natural parent, and on the court's view that the child's right to a hearing could not be conditioned upon the foster parent's request for a hearing. For similar reasons, the district court held that existing judicial procedures were inadequate.**

* A., pp. 12a-13a.

** The review provided by New York Social Services Law §392 takes place at the initiation of the child-care agency, whose discretion the court held to require review, or at the initiation of the foster parent, upon whom the district court decided the child's rights should not be dependent. Furthermore, the §392 review does not provide any representation for the child, the scope of its review and

[fn. cont'd p. 17]

This analysis is consistent with this Court's traditional and recently reaffirmed view of the protection provided by the due process clause: government action resulting in concrete loss or harm will give rise to due process safeguards under the Fourteenth Amendment. Paul v. Davis, U.S. , 44 U.S.L.W. 4337, (March 23, 1976);* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goss v. Lopez, supra; Goldberg v. Kelly, supra.

In reaching its decision, the district court relied on factors emphasized in another recent Supreme Court decision, Mathews v. Eldridge, U.S. , 44 U.S.L.W. 4224 (Feb. 24, 1976), in which

[fn. cont'd from p. 16]
jurisdiction is limited, (A., p. 14a) and agencies are free to remove children from foster homes independent of the court procedure. R., testimony of Jane Edwards, hearing tr., p. 98.

* In Huntley v. Community School Board of Brooklyn, F.2d (2d Cir., Docket No. 75-7190, decided May 12, 1976) the Second Circuit found that the due process clause had been violated, citing Board of Regents v. Roth, supra, and emphasized that the holding in Paul v. Davis, supra, merely distinguishes between remote harm caused by officials abusing their power and harm arising out of the exercise of official responsibilities.

"They [the School Board and the district superintendent] not merely have exercised official powers for improper purposes; they have abused state functions which they were charged with implementing." Huntley v. Community School Board of Brooklyn, supra, slip op. at 3698-3699.

the Court, id. at 4229, set out a three-pronged test: the private interest affected by the government action; the risk of incorrect deprivation and the degree to which better procedures would alleviate the risk; and the governmental interest involved.

In Mathews v. Eldridge, supra, the neutral nature of the information to be assessed prior to termination of disability benefits, the availability of adequate review procedures subsequent to termination, and the provision for full retroactive payment satisfied due process requirements. In the present situation, the district court considered the three elements of this test and found that each of them supported a finding that present New York procedures are unconstitutional.

First, the court concluded that the information to be assessed is often anecdotal, subjective, gathered from a variety of sources, not fully available, conflicting, and "some of it biased." (A., p. 20a, fn. 13a) In addition, Judge Lumbard, writing for the district court, recognized that post-removal procedures cannot possibly make a child who suffers the trauma of an unwarranted separation whole again,* unlike the person who has

* There was virtually no disagreement among the expert witnesses that it would be contrary to the best interests of a child to be removed from a foster home while there was a possibility that the removal decision would be reversed by a subsequent decision. New York Social Services Law §400 and 18 N.Y.C.R.R. §450.10(c), both declared uncon-

[fn. cont'd on p. 19]

wrongfully been denied disability benefits.

Furthermore, the governmental interests militate in favor of as full a review as possible prior to the removal of a child for whose welfare the state is responsible. In most instances, premature, precipitous removal does not even conserve governmental funds, since the child is likely to be removed to be placed in another foster care setting.* Appellees have suggested that the district court was incorrect in its reliance on the principles in Goldberg v. Kelly, supra, since the governmental decision-makers in the present case do not have interests adverse to those of the children whose lives their decisions will affect. The distinction between the present case and Goldberg v. Kelly, supra, is an unfathomable one; due process protections are necessary because government decision-makers, no matter how benign and well-

[fn. cont'd from p. 18]

stitutional by the court, provided for post-removal administrative review. See R., testimony of Florence Kreech, hearing tr., p. 69; dep. of Dr. Stella Chess, pp. 57-58.

"I think any such review process that takes place after the child has been removed is a travesty on the need of the child. . ." Dep. of Dr. Albert Solnit, p. 32.

* See fn. *, p. 11, supra.

motivated, can make mistakes.* Due process protections tend to minimize these mistakes by guaranteeing that as much information is presented as possible, in as fair and unbiased a procedure as feasible. The state, charged as it is with responsibility for both the emotional and physical well-being of foster children, has no conceivable interest in opposing procedures better calculated to provide such significant decisions with a greater degree of reliability.

"'No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and

* The New York child-care system, like any large bureaucracy, is not without serious criticism. A report, "Census of Children in Care Who May Need Adoptive Planning," by Bellisfield, Allen, and Hyde in 1971 for the New York City Department of Social Services, calls attention to thousands of New York City children lost in the limbo of "temporary" foster care, for whom foster care seems likely to be a permanent arrangement. See also "Barriers to the Freeing of Children for Adoption," Final Report to the New York State Department of Social Services, March, 1976.

Furthermore, three psychiatrists testified that they had reason to be critical of the initial decision-making process with regard to the removal of a child from a foster home. R., dep. of Dr. Albert Solnit, p. 34; Dr. Stella Chess, p. 59.

"[T]his is an area of enormous distress to those of us dealing

[fn. cont'd. p. 21]

opportunity to meet it.'
Anti-Fascist Committee v. McGrath, supra, at 170, 171-172, . . . (Frankfurter, J., concurring).'" Goss v. Lopez, supra, 419 U.S. at 580.

The district court decision has merely applied well recognized principles to New York State procedures for removing children from foster homes in which they have lived for a year or more. The court determined that the pre-removal procedures are so inadequate as to not provide even minimal due process safeguards,* and has ruled that the serious harm which is likely to result from precipitous and unnecessary removal cannot be cured by the availability of post-removal procedures.

[fn. cont'd from p. 20]

with psychiatric problems and child development problems.

...
"There is a kind of - I am sure it is based on some good intentions, a sense of ownership as far as children are concerned." R., testimony of Dr. Friedman, hearing tr. pp. 17-18.

* A., p. 37a. The district court order did not, in itself, mandate any specific procedures. It merely enjoined the existing procedures as unconstitutional, and required state and local officials "to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion. A., p. 17a.

This decision does not require further consideration, and should be summarily affirmed by this Court.

POINT II

THE DISTRICT COURT HAD
JURISDICTION TO ORDER
THE RELIEF GRANTED IN
ITS DECISION.

Appellants have argued that this Court should set this case down for plenary consideration based on an argument going to the district court's jurisdiction, and apparently composed of three elements which appellants have interwoven: whether an Article III controversy exists, whether appellees have standing, and whether the district court could grant the relief it did.

Admittedly, this case was decided in a somewhat unusual framework. Appellee foster parents filed suit asserting that the constitutional rights of both foster parents and foster children were being violated, with resultant harm to the children. A single judge of the district court appointed separate counsel for the foster children, who proceeded to file an answer to the complaint, argue that the constitutional rights sought were not in the best interests of children, and appeal from the district

court's decision.*

This situation did not, however, deprive the district court of jurisdiction. There can be no doubt of the existence of the actual controversy required by Article III of the Constitution; the foster parent plaintiffs were aggrieved by the procedures of which they complained, and had, and continue to have, a sufficient personal interest in the controversy to insure concrete adverseness in the presentation of the issues. Diggs v. Shultz, 470 F.2d 461, (D.C. Cir. 1972), cert. den., 411 U.S. 931 (1973).

The issue of standing is a part of the question relating to the existence of an actual controversy, as required by Article III. So long as appellees have alleged a distinct injury to themselves, as well as to the foster children, the requirement of Article III is satisfied. Appellees also

"may have standing to seek
relief on the basis of the

* Subsequent to the decision of the three judge court, appellee foster parents moved before a single judge for the appointment of substitute or additional counsel to represent the interests of the class of foster children whose rights the district court had held were being violated. While conceding that the situation was "somewhat anomalous" and that he believed the position of Helen Bittenwieser, the present attorney for the foster children, was "unsound," Judge Robert L. Carter denied the motion. The motion has been appealed to the United States Court of Appeals for the Second Circuit and will be argued the week of October 12, 1976.

legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." Warth v. Seldin, 422 U.S. 490, 45 L.Ed.2d 343, 356 (1975), citing Sierra Club v. Morton, 405 U.S. 727, 737 (1972), F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940).

Finally, it is clear that the district court had jurisdiction to grant any relief appropriate, regardless of whether any of the elements of the relief had been specifically requested.* Once a case is properly before a federal court, and the requirements of Article III satisfied, it is the essence of equity jurisdiction that

"where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . [F]ederal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946).

* Appellees sought constitutional protection for the foster family relationship in the district court. Judge Lumbard, writing for the court, afforded the relationship constitutional protection and ordered appropriate relief based on the constitutional rights of the foster children. Appellees thereby received all the relief they had requested.

See also J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15, 16 (1971).

The district court, having found that existing New York procedures violate the constitutional rights of foster children, was acting well within its authority in enjoining the unconstitutional statutes and regulation* and, based on the constitutional principles enunciated in its decision, setting forth the broad constitutional outlines under which new procedures should be formulated.

CONCLUSION

Since the district court reached its decision after evaluating a record of over 1200 pages of testimony and weighing the competing public and private interests involved, and in accordance with this Court's traditional and recently reaffirmed view of the due process clause of the Fourteenth Amendment, appellees respectfully urge this Court to grant their motion to affirm the decision of the district court.

Respectfully submitted,

Marcia Robinson Lowry
Children's Rights Project

* The appellees had sought such a ruling. See Mapp v. Ohio, 367 U.S. 643, 646, fn. 3 (1961).

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Dated: August 31, 1976
New York, New York

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

MICHAEL RODAK, JR., CLERK

Docket Nos. 76-180, 76-183, 76-5193
and 76-5200

J. HENRY SMITH, individually and as administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Appellants,

(Additional parties listed on next page)

On Appeal from the United States
District Court for the Southern
District of New York

BRIEF OF NEW YORK CITY APPELLANTS

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ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, etc., et al.,
Appelles.

BERNARD SHAPIRO, individually and as
Executive Director of the New York
State Board of Social Welfare, et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR
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NAOMI RODRIGUEZ, etc., et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES
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Appellees.

DANIELLE and ERIC GANDY, etc., et al.,
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-against-

ORGANIZATION OF FOSTER FAMILIES
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DUE PROCESS DOES NOT REQUIRE THAT A FOSTER CHILD, IN A FOSTER HOME CONTINUOUSLY FOR MORE THAN ONE YEAR, BE GIVEN A HEARING BEFORE REMOVING THE CHILD FROM THE FOSTER HOME. THE EXISTING ADMINISTRATIVE AND JUDICIAL PROCEDURES IN NEW YORK STATE WHICH INCLUDE A TEN DAY NOTICE AND ADMINISTRATIVE CONFERENCE BEFORE REMOVAL, A FAIR HEARING AFTER REMOVAL AND VARIOUS REVIEW PROCEDURES IN THE TRIAL COURTS OF NEW YORK STATE, ADEQUATELY PROTECT THE RIGHTS OF THE FOSTER CHILD.

ASSUMING, ARGUENDO,
 THAT DUE PROCESS DOES REQUIRE
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 PROMULGATED BY THE CITY OF NEW
 YORK PROVIDING A HEARING FOR
 ALL FOSTER PARENTS WHO REQUEST
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

Docket Nos. 76-180, 76-183, 76-5193
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-against-

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On Appeal from the United States
District Court for the Southern
District of New York

BRIEF OF THE NEW YORK CITY APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an order and
judgment entered on April 14, 1976, by

a three judge court for the Southern District of New York which declared Sections 383(2) and 400 of the New York Social Services Law and a regulation promulgated thereunder, 18 N.Y.C.R.R. §450.14 [now §450.10], as presently applied, to be in violation of the constitutional rights of foster children in a certified class. The order enjoined the municipal appellants from removing or authorizing the removal of any foster children from foster homes in which they have lived continuously for more than one year without notice and a hearing at which the foster parents, the foster child and the biological parents could present evidence.

On May 24, 1976, this Court stayed the enforcement of the order and judgment of the three judge court pending the docketing of the appeals. The New York City

appellants' jurisdictional statement was filed on August 6, 1976. This Court noted probable jurisdiction on October 12, 1976.

OPINION BELOW

The opinion of the three judge court is reported at 418 F. Supp. 277.

JURISDICTION

This appeal is from an order and judgment of a three judge court granting a permanent injunction and declaring unconstitutional state statutes and regulations having statewide applicability. The judgment and order of the three judge court of the District Court for the Southern District of New York was filed on April 14, 1976. The New York City appellants filed a notice of appeal to this Court

on June 9, 1976. Jurisdiction is conferred on this court by title 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Does the due process clause constitutionally require state and municipal officials to afford foster children hearings before removing such foster children from their foster homes?

2. Assuming, arguendo, that due process does require a prior hearing, does the procedure promulgated by the City of New York, which procedure provides a hearing for all foster parents who request it, except where the child is being returned to his natural parent, or where there is an emergency and where the child has not lived in the foster parents' house for more than one year, satisfy the requirements of due process?

STATEMENT OF CASE

We incorporate by reference the factual statement in the brief on behalf of the appellant natural parents.

SUMMARY OF ARGUMENT

(1)

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). This Court has invoked procedural due process so as to require a hearing where interests were found to be fundamental, such as where government action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

In the instant case, the interest of foster child in the foster care relationship with a specific foster family is adequately protected by the challenged administrative procedures and existing court remedies. The administrative procedures require that foster parents to be given ten days notice of a removal of a foster child from their home and an opportunity for an administrative conference before removal. After the child is removed the foster parents can request a fair hearing. The determination after the fair hearing can be reviewed in the New York State Supreme Court in an Article 78 proceeding.

The New York State Legislature has authorized periodic review by the New York City Family Court of all children in foster care for a period of 18 months.

Foster parents are permitted to participate in this proceeding. McKinney's New York Social Services Law § 392.

In addition, foster parents can bring a habeas corpus proceeding in the Family Court or the Supreme Court requesting that the child be returned to them. Foster parents also have standing to initiate a proceeding to terminate the natural parent's custody of a child on the ground of permanent neglect. McKinney's Family Court Act §§614, 615.

A pre-removal hearing would not necessarily benefit the foster child, and very likely would subject the child to emotional strain as a consequence of his participation. The questionable value of such a hearing does not warrant the substitution

a of new procedure for the existing procedures, which properly rely on the expertise of the social service workers. The presumption of regularity of their determinations in removing children from a foster home is supported by the statistics relating to S.S. Procedure No. 5, voluntarily instituted by the City of New York in August 5, 1974. That procedure permits foster parents to request a full trial type hearing before a child is removed from their home. If such a request is made, the child is not removed until a hearing has been held and a decision rendered. Since this procedure was instituted there have been only 26 hearings. There are approximately 2800 transfers a year.

(2)

Assuming, arguendo, that due process does require a hearing before a child can be removed from a particular home, the procedures promulgated by the City of New York on August 5, 1974, satisfy the requirements of due process. The majority on the three judge court objected to the City's procedures because the hearing would only be provided at the request of the foster parents, no hearing would be provided where the child was to be transferred to another foster home and the natural parents would not be a party to the pre-removal hearings.

The City's procedure properly requires that the foster parents request a hearing. If they agree to the transfer there is no purpose to the hearing.

With respect to the return of the child to the natural parent, the procedures properly do not require a hearing. In New York State, in the absence of abandonment, a statutory surrender or a judicial finding of unfitness, the child must be returned to his natural mother. Spence Chapin Adoption Service v. Polk, 29 NY 2d 196, 199, 274 N.E. 2d 431, 433 (1971). The due process hearing ordered by the court below would require the natural parents to justify their right to their children. This would be contrary to the purpose of the foster care program, which is to return children to their natural parents as soon as the parents are ready to care for them.

ARGUMENT

DUE PROCESS DOES NOT REQUIRE THAT A FOSTER CHILD, IN A FOSTER HOME CONTINUOUSLY FOR MORE THAN ONE YEAR, BE GIVEN A HEARING BEFORE REMOVING THE CHILD FROM THE FOSTER HOME. THE EXISTING ADMINISTRATIVE AND JUDICIAL PROCEDURES IN NEW YORK STATE WHICH INCLUDE A TEN DAY NOTICE AND ADMINISTRATIVE CONFERENCE BEFORE REMOVAL, A FAIR HEARING AFTER REMOVAL AND VARIOUS REVIEW PROCEDURES IN THE TRIAL COURTS OF NEW YORK STATE, ADEQUATELY PROTECT THE RIGHTS OF THE FOSTER CHILD.

ASSUMING, ARGUENDO, THAT DUE PROCESS DOES REQUIRE A PRIOR HEARING, THE PROCEDURE PROMULGATED BY THE CITY OF NEW YORK PROVIDING A HEARING FOR ALL FOSTER PARENTS WHO REQUEST A HEARING, EXCEPT WHERE THE CHILD IS BEING RETURNED TO HIS NATURAL PARENT, WHERE THERE IS AN EMERGENCY OR WHERE THE CHILD HAS NOT LIVED IN THE FOSTER PARENTS' HOME FOR MORE THAN ONE YEAR, SATISFIES DUE PROCESS.

We adopt the arguments for reversal presented by the other

appellants. We will present some additional comments and arguments which we believe should also be presented for consideration.

(1)

Article III, Section 2, clause 1 of the United States Constitution limits the exercise of judicial power to "cases and controversies". In the instant case, the right of a foster child to a pre-removal hearing was not urged upon the three judge court by any party or its attorney. In the District Court, the court appointed attorney for the foster children urged that the challenged procedures were adequate to protect the rights of the foster children.

In addition, the relief granted by the three judge court was not requested by any party or his attorney. The New York Civil Liberties Union, the attorney

for the plaintiff foster parents, which originally brought the action on behalf of foster children as well, only sought relief that would permit foster parents who requested a hearing to be given such a hearing before removal of the child.

It would appear that the foster children do not have a sufficient stake in the outcome of the litigation to satisfy the case or controversy requirement. See O'Shea v. Littleton, 414 U.S. 488, 493 (1974); Sierra Club v. Morton, 405 U.S. 727, 731-733(1972).

(2)

With respect to the merits, it is submitted that due process does not require that an evidentiary hearing should be accorded a foster care child who has continuously resided in a foster

home for more than one year before such child is removed from the foster home.

The requirements of procedural due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved.

Hannah v. Larche, 363 U.S. 420, 440 (1960). See also, Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In determining whether procedural due process requires an evidentiary hearing, this Court has considered the following factors: the nature of the right or interest that is threatened; the extent to which the proceeding is adversarial in character; the severity and consequences of any action that might be taken and the administrative burden that would be imposed in requiring a hearing. See Mathews v. Eldridge,

424 U.S. 319, 334-335 (1976).

Applying these factors to various factual situations, this Court, where the affected individual has suffered grievous loss, has invoked procedural due process so as to require an evidentiary hearing before interests could be adversely affected by governmental action. A prior hearing has been required where the governmental action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

Similarly, the individual's right to earn a living in his chosen occupation was determined to be a fundamental right, and therefore a license to engage in that occupation could not be revoked without a hearing. Schware v. Board of Bar Examiners, 353 U.S.

232 (1957). See also Bell v. Burson, 402 U.S. 535 (1971). It is noteworthy that where an individual was not barred from his profession, but only refused re-appointment to a job, this Court held that due process did not require a hearing before the termination of employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Even where the individual had worked in a college system for a period in excess of ten years, this Court held that due process required a hearing only if it could be shown that the individual had the contractual equivalent of job tenure. Perry v. Sindermann, 408 U.S. 593 (1972). See also, Arnett v. Kennedy, 416 U.S. 134 (1974). Cf. Bishop v. Wood, _____ U.S. _____, 48 L.Ed. 2d 684 (1976).

In the instant case, unlike the cases discussed above, the requirement of a due process hearing before the removal of a child from a foster home would impede the foster care program and might well constitute a detriment to the child himself. In addition, even if not a detriment, such hearing would not necessarily aid the administrative determination concerning what is best for the child.

The foster care program in New York State is charged with the responsibility for providing custodial care to children outside their own homes. The public and private agencies participating in the program accept for care children whose parents are temporarily unable to care for them but who are unwilling to place them for adoption. These children are cared for until such time as their own

families can properly care for them. Mtr. of Jewish Child Care Assn. (Sanders), 5 NY 2d 222, 224-225, 156 N.E. 2d 700, 701 (1959). During the period the child is in the foster home, specially trained employees of the public or voluntary agency assist those in the natural home in preparing for the return of the child. Assistance is also given to the foster parents. Foster parents accept the child with the understanding that the child will be returned to the natural parents as soon as possible. Mtr. of Jewish Child Care Assn., supra, 5 NY 2d at p. 225, 156 N.E. 2d at p. 701.

If the public welfare department or voluntary agency determines to remove a child from a foster home it must follow the procedure prescribed in Title 18 N.Y.C.R.R. 450.14 [now 450.10]. That

procedure requires the foster parents to be given ten days notice prior to removal of a foster child from their home. Following the notice, the foster parent may request an administrative conference. The child cannot be removed until three days after the conference.

The three judge court assumed that this procedure would not adequately protect the rights of the foster child. This assumption ignores the presumption that public officials will discharge their duties honestly and in accordance with the rules of law. See F.C.C. v. Schreiber, 381 U.S. 279, 289-291 (1965); Udall v. Washington Virginia and Maryland Coach Co., 398 F. 2d 765, 769 (D.C. Cir., 1968), cert. den. 393 U.S. 1017 (1969).

There is nothing in the record in the instant case to contradict this presumption. The only testimony on the practices of the agencies indicates that the employees of these agencies are only interested in the welfare of the foster children and their decisions as to the foster children are consistent with their responsibilities under the foster care program. See Joint Appendix, pp. 275a, 277a, 285a, 287a-288a, 289a.

The presumption of regularity is supported by the statistical evidence relating to the procedures instituted by the City of New York on August 5, 1974. Pursuant to that procedure, SSC Procedure No. 5, a foster parent can request a trial type hearing before removal. Between August 1974 and June 1976, only 26 foster parents requested hearings.

There are approximately 2800 transfers a year.

An additional factor is that the due process hearing during the pre-removal stage of the administrative process will not necessarily aid in determining what is best for the foster child, and, in addition, may in fact be harmful to the child.

At many such hearings, it can be anticipated, evidence will be adduced indicating merely a conflict in opinion between social workers. The hearing officer, who may in fact be less knowledgeable than the welfare officials who are charged with administering this program, will then choose among the opinions. Under such circumstances, the requirement of a hearing does little to advance the search for truth.

In addition, the child's participation at such a hearing will in most cases not aid the decision making process, and may in fact be harmful. The child, is by no means, always capable of determining what is best for him, and, his presence at the hearing, also attended by the foster parents and, in some cases, the natural parent, will only exacerbate the tensions among the parties.

The requirement of this hearing where the child is being returned to the natural parent is contrary to the purpose of foster care. By interposing this additional procedure before a natural parent can have the child returned to her, the three judge court has frustrated the purpose of foster care, i.e., to return a child to his natural parent as soon as the natural parent is ready to accept the

child. Approximately 75% of all placements are voluntary. If a due process hearing is to be required before the child may be returned to its natural parent, many natural parents who would otherwise voluntarily place their children in foster care may refuse to do so. Indeed, any delay in returning the child to the natural mother upon the mother's request would be contrary to state law. In the absence of abandonment of the child, statutory surrender outstanding, or the established unfitness of the natural mother, neither the court or an authorized agency have the power to deprive the natural mother of custody of her child. See Matter of Spence-Chapin Adoption Service v. Polk, 29 N Y 2d 196, 199, 274 N.E. 2d 431, 433 (1971); (1971); Bennett v. Jeffreys, 40 NY

2d 543, 544, ____ N.E. 2d ____ (1976);
Mtr. of Teeter v. Pruiksma, 47 AD 2d 101,
104, 364 N.Y.S. 2d 656, 660 (4th Dept.,
1975). See also, McKinney's Soc. Serv.
Law §384.

In determining that the foster children are entitled to pre-removal hearings, the three judge court has in fact increased the rights of foster parents and decreased the rights of the biological parents. Such a result conflicts with this Court's recognition of the unique rights attaching to the natural family. Compare Stanley v. Illinois, 405 U.S. 645 (1972) and Armstrong v. Manzo, 380 U.S. 545 (1965) with Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). See also, Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal., 1970), affd. 400 U.S.

1003 (1971).

Even where the child is being removed from a foster home to be transferred to another foster home, the due process hearing will have an adverse effect on the foster care program. The decision to transfer from one home to another results from the judgments of social workers that such transfer will be of help to the child. A requirement of a hearing will only delay the transfer and deprive the child of this change made for his benefit. In addition, if a hearing is required before any transfer can occur, even where the foster parents have no objection to the transfer, the social workers may be deterred from recommending transfers rather than participate in these hearings.

The present administrative and judicial procedures adequately protect the foster children's rights without unnecessarily encumbering the foster care program and frustrating the purpose for which it was created.

After the administrative conference has been had and the child is removed, the foster parent can request a fair hearing. McKinney's New York Civil Service Law §400. The determination at the fair hearing can be reviewed in an Article 78 proceeding in the New York Supreme Court pursuant to CPLR 7800 et seq.

In addition to these administrative remedies, the New York State Legislature has mandated periodic review and supervision by the Family Court of each child in foster care

for a continuous period of 18 months.* McKinney's New York Social Services Law, Section 392. The authorized agency charged with the care of a foster child is required to file a petition seeking such review. The foster parents are permitted to participate in the Family Court proceeding. The foster parents are entitled to appear and give their opinions to aid the Family Court in determining what future placement would be in the best interests of the child. Section 392.

In addition, the foster parents can bring a habeas corpus proceeding in the New York Supreme Court or the Family Court challenging the authorized

*The original law provided for a twenty four months period which was reduced to eighteen months in 1975. L.1975, Ch. 708.

agency's determination to remove the child. See Matter of Mack, 81 Misc. 2d 802, 367 N.Y.S. 2d 844 (Fam. Ct., Queens Co., 1975). The foster parent can also initiate a proceeding to terminate the natural parent's custody of a child on the ground of permanent neglect. McKinney's Family Court Act §§614, 615. See N.Y. Soc. Serv. Law §383.

(3)

The three judge court cited this Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970), in support of its position. In Goldberg this Court noted that the crucial factor was that "termination of aid pending resolution of the controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397

U.S. at p. 264. Two other factors were present in Goldberg: welfare was mandated by federal law and an evidentiary hearing was appropriate because the issue of eligibility would be determined based on eyewitness testimony and documentary evidence regarding sharp factual disputes.

In this case, unlike in Goldberg, the foster children will continue to be provided with foster care services during the pendency of the administrative procedures and subsequent court proceedings. Unlike welfare, foster care service is not a mandated federal program but established by state laws, which laws also provide the conditions under which foster parents accept foster children. In addition, as we discussed above, an evidentiary hearing would probably involve opinion testimony as to what is best for the foster

child.

These challenged procedures properly rely on the expertise of the social service workers who, because of their specialized knowledge and experience, are in the best position to determine if a child should be removed from a foster home. It can be presumed that the workers will act in the child's best interests. These workers have no adverse interest, financial or otherwise, which would be furthered by removing a child from a particular foster home. In contrast, in Goldberg, the municipality had a financial interest in terminating a recipient's benefits as soon as possible.

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court, in holding that a hearing was not required before terminating disability benefits, distinguished

Goldberg, noting that the determination of eligibility for disability benefits is best determined by medical personnel and tests, rather than an evidentiary hearing.

(4)

This Court has recognized the principle that a court should not substitute its social and economic beliefs for the judgment of a state legislature under the authority of the due process clause. Ferguson v. Skrupa 372 U.S. 726 (1963). Consistent with Ferguson, this Court recently in Paul v. Davis, 424 U.S. 693 (1976), in dismissing a §1983 action based on defamation, recognized that a plaintiff has a heavy burden to sustain in order to implicate a liberty interest sufficient to invoke procedural due process. See also, Meachum v. Fano, ____ U.S. ____, 49 L.Ed. 2d 451 (1976).

In the instant case the District Court has required pre-removal hearings for every child who has continuously resided in a foster home for more than one year. Under New York State law, the Family Court is required to review the status of every child who has been in foster care for a continuous period of eighteen months. McKinney's New York Social Services Law §392. As pointed out above, children in foster care more than one year but less than eighteen month can have their status reviewed in various administrative or court proceedings.

Under these circumstances, the foster care program, established by New York State to aid troubled families, should not be altered by a federal court under the authority of the due

process clause in the absence of any showing of grave abuses under the existing procedures.

(5)

Assuming, arguendo, that due process does require a hearing before a foster child can be removed from the foster parents, it is submitted that the procedure promulgated by the City of New York on August 5, 1974, during the pendency of this court proceeding, satisfies the requirements of due process. The procedure is set forth as Appendix C annexed to the Jurisdictional Statement of the Municipal Appellants. The City's procedure provides for a trial type hearing modeled after a state fair hearing. The parents are permitted to have counsel, to present evidence and to cross-examine opposing witnesses.

The three judge court objected to the City's procedures because (a) the hearing would only be provided at the request of the foster parents; (b) no hearing would be provided where the child was returned to his natural parents; and (c) the natural parents would not be a party to the pre-removal proceedings.

The City's procedure properly requires the foster parents to request a hearing. The purpose of the hearing is to review the reasons for the agency's determination to remove the child from the foster care home. If the foster parents do not request a hearing, and are therefore in agreement with the transfer, there is no purpose to the hearing. The failure to request such a hearing is the best evidence that a hearing is not necessary.

The City's procedure satisfies the claims of the original counsel for the plaintiffs, who only sought to have pre-removal hearings provided to foster parents who requested them (see Joint Appendix 21a-23a, 29a, 32a; plaintiffs memorandum of law in support of motion for declaratory judgment and preliminary injunction, at pp. 26-27). As Judge Pollack noted in his dissent, the District Court's mandate that a hearing be provided even when not requested by foster parents has come as a surprise to all the parties (dissenting opin. at pp. 5-6). The District Court's direction that a hearing be provided even when not requested by a foster parent is apparently based on the assumption, without any proof in the record, that the professionals charged with the responsibility of operating the

foster care program will act adversely to the child. A statistical evaluation of the hearings under these new procedures does not support this conclusion. As we noted above, since the implementation of the new procedure in 1974, there have been only 26 hearings. There are approximately 2800 transfers a year.

The City's procedures properly do not require a hearing where the child is to be returned to the natural parent. As we discussed above (supra, p. 23), in New York State, in the absence of abandonment, statutory surrender or a judicial finding of unfitness, the child must be returned to his natural parents. A due process hearing would place the natural parents in an unfair position since it would improperly compel them, in an administrative proceeding, to

justify their rights to their own children. This would be contrary to the purpose of foster care to return the children to the natural parents as soon as the parents are ready to care for them.

Since the implementation of the new procedure, only seven foster parents have sought review of decisions to return foster children to their natural parents, despite the fact that there have been almost two thousand such decisions since 1974. In view of this history, it is unnecessary to require a hearing where the child is to be returned to its natural parents. To require natural parents to participate in such hearings would inevitably result in emotional confrontations between the foster parents and natural

parents, to the detriment of the child.

Where a hearing is held to determine whether a child should be transferred from one foster home to another, the City's procedure properly refuses to allow the natural parent to participate. The natural parents, who at this point have no desire to have the child returned to them, would not add anything of substance to the proceeding and their participation would only result in delay and confusion on the narrow issue before the hearing officer.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE
REVERSED AND A DECLARATION OF CONSTI-
TUTIONALITY DIRECTED IN FAVOR OF THE
CHALLENGED STATUTES AND REGULATION.

December 17, 1976.

Respectfully submitted,

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DEC 17 1976

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-180 J. HENRY SMITH, *etc. et al.*,
Appellants-Defendants,
against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,
Appellees.

76-183 BERNARD SHAPIRO, *etc. et al.*,
Appellants-Defendants,
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Appellees.

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,
Appellants-Intervenors,
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AND REFORM, *etc. et al.*,
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76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,
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AND REFORM, *etc. et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS

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IN THE
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76-180 J. HENRY SMITH, *etc. et al.*,
Appellants-Defendants,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLANTS

Opinions Below

The opinion of the three-judge District Court for the
Southern District of New York in *Organization of Foster*

Families For Equality and Reform, et al. v. Dumpson, et al. granting declaratory and injunctive relief (Appellants' Joint Appendix to Jurisdictional Statements, [hereinafter "A.J.S."] at 1a-20a), dated March 29, 1976, is reported at 418 F. Supp. 277. The opinion of United States District Judge Robert L. Carter dated March 22, 1976, granting motions to certify classes of foster children, natural parents and foster parents (A.J.S. 42a-50a) is not reported.

Jurisdiction

The final Order and Judgment appealed from was entered in the District Court on April 14, 1976 (A.J.S. 36a-38a). The notice of appeal to this Court was filed in the District Court on June 10, 1976 (A.J.S. 39a-41a), the jurisdictional statement was filed August 9, 1976, and probable jurisdiction was noted by this Court on October 12, 1976.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

Statutes and Regulation Involved

Sections 383(2) and 400 of the New York Social Services Law, McKinney's Consolidated Laws of New York Annotated, Vol. 52A (1976) and Title 18 New York Codes Rules and Regulations § 450.10, Vol. 18(B) are reproduced at A.J.S. 51a-53a.

Questions Presented

1. Did the District Court err in finding that foster children in New York are subjected to "peremptory" transfers which result in a "grievous loss", and that foster children have a constitutionally cognizable "liberty" interest in their relationship to a particular set of foster parents who provide them with temporary care pursuant to contract rather than an adoptive home?

2. Did the District Court err in requiring an automatic hearing in virtually every case where a foster child who has been in a particular foster home for more than one year is to be transferred back to his natural parents, to another foster home, or to an adoptive home, in light of existing statutory procedures which fairly protect the interests of the child?

Statement of the Case

A. Appellants-Defendants Shapiro and Lavine respectfully incorporate herein by reference the Statement of the Case as set forth in the Brief for Appellants Naomi Rodriguez et al.

B. Present New York Foster Care Procedures

New York has long been recognized as a leader in the development of foster care services.* See, e.g., A. Kadushin, *CHILD WELFARE SERVICES* (2nd Ed.; New York, Macmillan Publishing Co., Inc., 1974) at 395. Today New York premises its foster care system on the accepted principle that the placement of a child into foster care is solely a temporary, transitional action intended to lead to the future reunion of the child with his natural parent or parents, or if such a reunion is not possible, to legal adoption and the establishment of a new permanent home for the child. In a 1976 amendment to the New York Social Services Law the New York Legislature reaffirmed the policy of New York's foster care system in the following terms:

"1. Statement of legislative findings and intent.

* The Child Welfare League of America defines "foster care" as "[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period and when adoption is neither desirable nor possible." Child Welfare League of America, *STANDARDS FOR FOSTER FAMILY CARE* (New York, 1959) at 5.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption."

New York Social Services Law* § 384-b, L. 1976, ch. 666, § 3 (R.A.).**

These goals reflect the paramountcy which New York law has always accorded to the preservation of biological families as its highest priority and to the provision of another permanent home for a child unable to continue to reside with his natural parents. *In the Matter of Jewish Child Care Association of New York [Sanders]*, 5 N.Y. 2d 222 (1959) (purpose of foster care is to prepare child for return to natural parents).

Thus, it is neither intended nor desired that foster care placement become permanent for a child entering the foster care system. See, e.g., N.Y. Soc. Serv. Law § 440(1), L. 1976, ch. 668. Foster parents must be licensed by the State, N.Y. Soc. Serv. Law § 375, either directly, N.Y. Soc. Serv. Law § 377, or indirectly through a state-authorized private foster care agency ("agency"),*** N.Y. Soc. Serv. Law § 376. Foster parents provide foster care services pursuant to a contractual agreement with the placing-out agency. N.Y. Soc. Serv. Law § 374(1-a). A child in foster care remains at all times in the legal custody of the agency or social services department ("department") accepting responsibility for him, as a result of several different kinds of placements. He may be placed voluntarily by his parents**** (N.Y. Soc. Serv. Law § 384-a [R.A.]); or time-limited custody may be granted to the Commissioner of

* Hereinafter "N.Y. Soc. Serv. Law."

** "R.A." indicates that the cited statutory provision is reproduced in the separate Appendix to Brief for Appellants Naomi Rodriguez *et al.*

*** The participation of private social welfare agencies as an important element of the New York foster care system dates back over a century to the New York Children's Aid Society, which initiated the first foster family care placements. Kadushin, *CHILD WELFARE SERVICES*, *supra*, at 395-6.

**** Voluntary placements comprise approximately 80% of all entries into the foster care system. Deposition of Dr. David Fanshel, Record Docket Number 93, p. 79.

Social Services by order of a judge of the Family Court (Articles 7 and 10 of Family Court Act); or permanent custody and guardianship of children may be granted to the Commissioner by order of a judge of the Family Court or the Surrogate pursuant to Soc. Serv. Law §§ 384, 384-b (R.A.). The standard contract executed by a foster parent upon accepting the placement of a child in his care confirms the right of the agency or department placing out the child to recall him "upon request". A.J.S. 8a; N.Y. Soc. Serv. Law § 383(2).

Under current New York law, the agency or department with custody of a foster child may remove the child from a foster home into which it has placed him by giving the foster parents 10 days written notice of such a removal, N.Y. Soc. Serv. Law § 384-a(2) (R.A.); except where an emergency requires immediate removal, 18 New York Codes Rules and Regulations* § 450.10(a). Upon receipt of such written notice, the foster parents may obtain a conference with an official of the department authorizing the removal. At that conference the foster parents may appear with an attorney, have the proposed action reviewed, be advised of the reasons for the action, and have an opportunity to submit reasons why the child should not be removed. *Ibid.*

The foster parents' request for a conference automatically stays the child's removal. The conference must be scheduled within 10 days of the foster parents' request, and the department's official must make a decision following the conference and issue it in writing within five days after the conference. Removal may not occur until at least three days after notice of the decision is sent to the foster parents. 18 N.Y.C.R.R. § 450.10(b)-(d). The foster parents are then entitled to appeal to the New York State Department of Social Services, and obtain a fair hearing on the removal decision. N.Y. Soc. Serv. Law § 400; 18 N.Y.C.R.R. § 450.10(c). A written determination must be rendered by the fair hearing officer within 30 days of the hearing. N.Y. Soc. Serv. Law § 400. There

* Hereinafter "N.Y.C.R.R."

is no statutory prohibition to removal of the child during the pendency of the disposition of the fair hearing.

Foster parents have other statutory rights under New York Law. Section 392 of the New York Social Services Law creates a foster care review proceeding in the New York Family Court in relation to any child who has remained in foster care for a continuous period of eighteen months. N.Y. Soc. Serv. Law § 392(2) (R.A.). The agency or department with custody of the child must file a review petition at that time, N.Y. Soc. Serv. Law § 392(2)(a), and foster parents may file such a petition at any time thereafter, N.Y. Soc. Serv. Law § 392(2)(c). In this proceeding, the court must enter an order embodying one of four dispositional alternatives for the child: (1) directing continuation of foster care, (2) directing return of the child to his natural parent, guardian or relative, (3) directing the agency to institute a proceeding to free the child for adoption, and permitting the foster parents in some circumstances to institute such a proceeding if the agency fails to act within 90 days, or (4) if the child is already free for adoption, directing that the child be placed for adoption with the foster parents or any other person. N.Y. Soc. Serv. Law § 392(7), as amended by L.1976, ch. 666, § 5. The sole criterion for this decision is "the best interest of the child." *Id.* In addition, foster parents are entitled after twenty-four months of continuous care of a child to intervene as a matter of right in any proceeding involving the custody of the child. N.Y. Soc. Serv. Law §§ 383(3) (R.A.), 384(3).*

* New York City provides an additional administrative procedure for foster parents. See Appendix C to Jurisdictional Statement of Appellants Smith *et al.*, p. A8 *et seq.* They may obtain a pre-removal "independent review" hearing on the record before a disinterested social services official, at which they may have counsel and present witnesses and evidence, cross-examine adverse witnesses, and have access to relevant agency files. A written decision, supported by reasons, must be issued within five days. Such hearings are not provided when a child is returned to his natural parents.

New York's scheme for the protection of children in foster care also imposes upon the natural parents stringent requirements for maintaining contacts with the children during the period of their foster care. These standards seek to insure that a child will not be returned to his natural parents unless the parents have maintained a constant and continuous regimen of visiting with the child in foster care. Section 384-b(5) of the Social Services Law provides that parental rights may be terminated upon a finding of abandonment by the parent if:

"(a) . . . such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision."

Section 384-b(7)(b) states:

"For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact."

These new sections supplement and expand Section 611 of the Family Court Act, which also provides that a child can be declared permanently neglected if parents do not maintain substantial contact with him while he is in foster care. (R.A.).

In *Bennett v. Jeffreys*, 40 N.Y. 2d 543 (1976),* the New York Court of Appeals expressed the current balance of interests reflected in the procedures for custodial disposition authorized by New York law:

"Recently enacted statute law, applicable to related areas of child custody such as adoption and permanent neglect proceedings, has explicitly required the courts to base custody decisions solely upon the best interest of the child. . . . Under these statutes, there is no presumption that the best interest of the child will be promoted by any particular custodial disposition." *Id.* at 547.

While emphasizing the crucial element of the child's best interest, the Court rejected any right of third parties to compel continuation of a custodial relationship:

"Particularly rejected is the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire 'rights'—really the opportunity to be heard—only derivatively by virtue of the child's best interests being considered, a consideration which arises only after, as the cases have always held, the parent's rights and responsibilities have been displaced." *Id.* at 552, n.2.

* *Bennett* did not involve a formal foster care situation; the child had been separated from her mother for eight years, and was living with a former schoolmate of the child's grandmother. The Court's discussion, however, set out extensively New York's law concerning the best interests of the child.

Summary of Argument

The majority of the three-judge District Court held that a child's transfer from a foster home in which he has been living, "be it to another foster home or to the natural parents who initially placed him in foster care" (A.J.S. 10a) constituted a "grievous loss" *Ibid.* The court then concluded that it was conferring a benefit or "right" on foster children by requiring that temporary foster care be prolonged—and return home delayed—during the course of an administrative adversary hearing which may be attended by judicial review and appeals.

The assumptions upon which this ruling was predicated were totally unsupported by the record. There was no evidence of capricious movements or arbitrary transfers of foster children, nor the slightest proof that the agencies charged with responsibility for supervision of such children do not compile sufficient data to make informed professional judgments. Moreover, the theory that return to the child's natural parents, transfer to a more suitable foster family, or removal to an adoptive home is a "grievous loss" was refuted by the only empirical study introduced into evidence; this longitudinal study of 624 children in foster care showed the durability of the children and the lack of a statistically significant correlation between number of placements and successful adjustments.

Equally erroneous was the District Court's statement that pre-removal hearings would not "impede the right of biological parents to regain custody of their children" (A.J.S. 11a) and that such hearings are "compatible with" the State's *parens patriae* role. (A.J.S. 12a). Natural parents, who would be compelled to litigate in order to secure return of their own child and then await the outcome of the administrative hearing and judicial review, would obviously suffer a serious and unwarranted burden. The State would be compelled to act as the instrument of

separating parents and children rather than reuniting families—hardly a proper exercise of its *parens patriae* function. In addition, the fiscal and administrative cost to New York of holding as many as several thousand hearings every year and of maintaining the children in the foster home pending the fair hearing decision, is clearly substantial.

Finally, there is no source in state law or in the Constitution for the court's finding that foster children have a "liberty" interest in their relationship to a particular set of foster parents who provide them with temporary care pursuant to contract rather than an adoptive home. Cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Meachum v. Fano*, 427 U.S. —, 96 S.Ct. 2532 (1976); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Even assuming *arguendo* the existence of such an interest, the court erred in requiring an automatic pre-removal hearing each time a child is transferred from a foster home in which he has resided for twelve months. New York presently provides, *inter alia*, a full judicial hearing which can be invoked by foster parents after a child has been in foster care for eighteen months. The rights of foster children are enhanced far more by New York's statutory scheme, which seeks to effectuate reunion with the family or adoption, than by the adversary hearings and attenuation of temporary foster care contemplated by the court below.

POINT I

The automatic hearings mandated by the court below do not accord a beneficial right to children but rather create an unnecessary and harmful burden on children and natural parents.

A. The District Court's finding that removal from a foster home is a "grievous loss"

The majority decision below held that a child's transfer from a foster home in which he has been living, "be it to another foster home or to the natural parents who initially placed him in foster care," constituted a "grievous loss."^{*} The court then concluded that it was conferring a benefit or "right" on foster children by requiring that temporary foster care be prolonged—and return home delayed—during the course of an administrative adversary hearing which may be attended by judicial review and appeals. This decision, which represents a judicial choice among competing social science theories, was arrived at with virtually no data base and no analysis.

The finding that a departure from a foster home is a "grievous loss" cognizable under the Constitution must be predicated on more than mere assumption. The District Court refused to recognize that the "loss" associated with such a move is a necessary component of the child's successful adjustment to a permanent home with his own parents or adoptive parents. As Professor Henry Grunebaum of the Harvard Medical School testified (A. 260a): "[Separation from foster parents] . . . entails a period of re-

^{*} Appellants' Joint Appendix to Jurisdictional Statement (hereinafter "A.J.S."), at 10a.

It should be noted that such hearings would also prevent adoption of the child, yet many foster parents do not wish to adopt the foster child even after he has become free for adoption. Appendix in the Supreme Court of the United States (hereinafter "A."), at 289a, 299a.

adjustment to the natural mother, and I believe that loss and that separation is probably better for the child to go through." Further, there is no evidence in the record that the parents, adoptive parents, or new foster parents to whom children are transferred are indifferent or unable to provide a happy and loving home. Indeed, the court cited no evidence in support of its constitutional holding, relying solely on a comment that "on the basis of our common past" separation from a familiar environment creates a "trauma."^{*} The majority below also failed to consider any possible trauma resulting from the child's further separation from his natural parents.^{**}

Appellees relied heavily on J. Goldstein, A. Freud, and A. Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* (Free Press, 1973) (hereinafter "Goldstein"), in contending that there must be a prior hearing each time a child in foster care for more than one year is removed, because continuity of the foster care relationship must be the dominant concern to those with the best interests of the child at heart. The Goldstein text espouses the doctrine that when a biological parent ceases to provide primary care for a child and is replaced for a period of time (varying according to

^{*} A.J.S. 11a.

^{**} Nor did the Court discuss the detriment to a child which could result from further maintenance in an unsuitable foster home. That children are more likely to be moved too slowly rather than too quickly from a foster home is documented in Point I(B) below. As Dr. David Fanshel, a witness for appellants, testified (A. 168a-169a).

"Professionals in the field have recognized that most people cannot be parents to all children. They have certain proclivities. Some children bring out the best in them, some provoke them. Some do it on the basis of their age; when they become more inquiring

" . . . So that the placement must be viewed as an experiment in living. And it demands that the agency pay close attention as to what's going on, because if they mismatch, as has occurred, the child will pay the consequences for that."

the age of the child from two to perhaps 18 months) by any other parent-like figure (e.g., a foster parent), then the biological family comes to an end and the child becomes a member of a new "psychological family". This theory is at variance with the protection accorded to the biological family both by New York and by this Court. *In the Matter of Jewish Child Care Association of New York [Sanders]*, *supra*; *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465 (1953) (natural mother who gave child up for adoption for two week period allowed to regain custody absent showing of unfitness); *Spence-Chapin Adoption Service v. Polk*, 29 N.Y.2d 196 (1971) (natural mother allowed to regain custody of child from foster parents); *Stanley v. Illinois*, 405 U.S. 645 (1972) (father of illegitimate child may not be presumptively denied parental rights); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state ban on teaching of foreign languages in private schools invalidated); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state requirement of compulsory public education invalidated); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (state law permitting sterilization of habitual criminals invalidated).

The thesis of the Goldstein book is that "[u]nlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack the capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another" (p. 12).^{*} By implication, the foster child would either (1) love only the foster parents instead of his own parents; or (2) care only for his natural parents and not for his foster parents. Situation (2), as noted above, was not considered by the court at all when it decreed automatic pre-removal hearings.

^{*} The Goldstein book goes so far as to suggest that the "custodial" parent should be able to exclude the "nonecustodial" parent from visiting the child altogether (p. 38).

The exclusive feeling for foster parents postulated in situation (1) is unlikely to occur; placement in foster care does not mean that a child's feelings towards his natural parents are no longer of much significance. Appellees' own witness at trial, Dr. Marie Friedman, acknowledged in response to a question about whether attachment to a foster parent cancels out attachment to the natural parent:

"No. One doesn't cancel the other out. And I think characteristic of the problems that exist with not only foster care children, any child who has lost a parent early in life, is that there is a sort of universal search for the lost parent. Idealized though it may be, it goes on and on. Children can have very adequate adjustments to life with the absence of a parent, whether it is replaced by a foster parent or not, and continue to have that yearning, longing search for the original parent." (A. 270a-271a).^{*}

The "best interests" of the child cannot be separated from the interests of his natural parents as easily as the proponents of the "psychological family" doctrine would assert. As Professor Henry Grunebaum testified: "[E]xperience in family psychiatry and work in family psychiatry and family therapy leads to the conclusion that while it is very important for children to be cared for and needed by their parents, it is very important for children to feel that there are things that they can do for their parents and that their parents need them; . . . and

^{*} The same point was made by Dr. David Fanshel (A. 175a-176a): "[T]here's been this whole phenomenon in the adoption field of the quest of grownup people for their forebearers. So that I see as a primary relationship the biological tie. I don't invest that with some mystique. . . . I don't take the view that the primary relationship has been improved if there has been total failure of the child-caring personnel. I do take the view though, all things being equal, that the [primary] relationship is the most significant one potentially, and it is the obligation of agencies to support that relationship."

children will feel very guilty in adult life if they have some feeling that they have left a parent in the lurch in one way or another when that parent needed them. So it seems to me from the child's point of view, it is important that one takes the parent's point of view into account and vice versa." (A. 256a-257a).

The methodology of the Goldstein book has incurred serious criticism. See, e.g., "Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action," by D. Katkin, B. Bullington and M. Levine, *Law and Society Review* 669 (Summer, 1974), which cites the book as "an example of the wrong way to employ social science to solve problems of social policy" (p. 669). The critique points out the lack of a thorough data base, the confusion between causality and correlation, and the failure to examine the question of "whether separation per se is harmful to children, or whether it is the relative deprivation that often follows separation that is destructive" (at p. 674).*

The record in the court below does contain objectively derived data on the effect of multiple placements of children; however, this data supports appellants, not appellees. Dr. David Fanshel, Professor of Social Work at the Columbia University School of Social Work, testified extensively concerning his longitudinal study of 624 children who were followed for five years after their entrance into foster care in 1966. (A. 159a-160a). Three teams participated, one focusing on the parents, one on the agencies, and one on the adjustment of the children. Psychologists tested the children 90 days after arrival in care, 2½ years later, and after five years, including among other analyses the contrasts between the children remain-

* Dr. Fanshel noted that the Goldstein book worked "back to the problems of the child deductively from general principles, without any reference to sampling, [the] representativeness of cases, to the general population of children in foster care" (A. 181a-182a). See also Professor Grunebaum, A. 255a.

ing in care and those who had returned home. Teachers described the adjustment of school age children, and social workers who knew the children also evaluated them according to numerous criteria.* Early developmental histories were included in the equation, so that personality disturbances at the start of foster care could be taken into account. The length of time the children spent in care, the number of placements and the degree of contact with parents were all examined. (A. 170a-171a).

Dr. Fanshel found that this extensive data failed to support the theory that after a year in one setting, removal would create a trauma. He found no proof that such a transfer would pose a "hazard of a pathogenic process taking place which is so overwhelming a hazard, that one should approve . . . the earlier transient [foster care] relationship." (A. 173a-174a). Instead, the objective evidence showed the durability of the children and the lack of a statistically significant correlation between number of placements and successful adjustment.

B. The District Court's holding that automatic hearings do not "impede" the rights of natural parents and are "compatible with" the interest of the State

The decision of the majority below asserts that pre-removal hearings would not "impede the right of biological parents to regain custody of their children." (A.J.S. 11a). The substantial and heartbreaking delay which would be created by such automatic hearings and their judicial aftermath are not even mentioned. Yet, two parties in this action have experienced such delay resulting from a custody contest. Litigation concerning return of two of the Wallace children to their natural mother commenced in June of 1974 and was not concluded until April,

* Dr. Fanshel had also analyzed a master tape of the Child Welfare Service concerning the reasons for placement of 23,000 children. (Deposition in the District Court, Record Docket Number 93, p. 12.)

1976, when the New York Court of Appeals dismissed an appeal from the decision of the Appellate Division affirming the decision to return the two girls to her immediately. *State ex rel. Wallace v. Lhotan*, 39 N.Y. 2d 705 (1976). Another example is intervenor-appellant Naomi Rodriguez, who asked for return of her child in February, 1973. The agency caring for the child rejected the request, and the subsequent litigation lasted from October, 1974 until June, 1976, when the Appellate Division ordered the child's return to her. *Matter of Rodriguez v. Dumpson*, 52 A.D. 2d 299 (1st Dept. 1976).*

Since such delays can occur even under current procedures, the requirement of automatic hearings before each removal would substantially increase the probability of such occurrences. The necessity for natural parents to litigate in order to secure return of their own child after a voluntary placement is in itself a serious and unwarranted burden.

The District Court held further that the interest of the State, as *parens patriae*, is "compatible with, rather than antagonistic to, the requirement of a hearing." (A.J.S. 12a). No reference is made to the primary purpose of foster care, which is to reunite families. See *Ramos v. Montgomery*, 313 F.Supp. 1179 (S.D. Cal. 1970), *aff'd mem.* 400 U.S. 1003 (1971). This purpose is parallel to the Congressional purpose set out in Title XX of the Social Security Act, 42 U.S.C. § 1397 *et seq.*, which provides funds to the State for programs including foster care services. If the Constitution were interpreted to regard the child as having ceased to be a member of his biological family after only a few months or a year with a new family, reunion of that child with his natural parents would become a mean-

* See also § 392(2)(c) of the Social Services Law, § 651 of the Family Court Act (R.A.) and *Matter of Mack*, 81 Misc. 2d 802, 367 N.Y.S. 2d 644 (Fam. Ct., 1975), which all provide a basis for a stay of removal of a child from a foster home.

ingless, unattainable goal. The effect of the decision below is to compel the State to act as the instrument of separating parents and children—a role hardly "compatible with" its *parens patriae* function.

The State's interest in a viable foster care system would also suffer serious impairment as a consequence of the decision below. If foster care presents a risk of delay, litigation and the possible permanent loss of the child, mothers will obviously be reluctant to use it. Parents will instead be increasingly likely to seek temporary and less satisfactory solutions outside of the formal foster care system. (A. 163a).

Moreover, the fact that custody hearings would be automatic and inevitable with the transfer decision depending on the information produced at the hearing, poses the risk that foster parents would use their influence over the child who is in their home to induce him to express a "preference" for them rather than for his natural parents. Whether the child's statement changes the outcome of the hearing or not, the goal of the foster care system would be undermined if foster parents attempted to interfere with the child's relationship to his mother and father. Foster parents have contractual and moral obligations to support and enhance the child's relationship to his natural parents.

The cost of implementing the District Court's due process scheme was also ignored in the decision below.* First, the annual fiscal burden to New York of holding thousands of foster care hearings, complete with hearing officers, court reporters, clerical and administrative support personnel, as well as disinterested adult representatives for the children, is clearly quite substantial. The foster care hearings now provided under New York law (pursuant to

* This Court indicated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that fiscal factors may be considered in determining the appropriateness of a procedure under the Due Process Clause.

N.Y. Soc. Serv. Law § 400) typically are longer and more complex than other welfare-related administrative hearings, taking at least one full day. (A. 141a-142a). The cost of such hearings is correspondingly higher as well. As to the number of automatic hearings which would be required, almost 5,000 children were discharged from the New York foster care system in the first three months of 1976 alone. See New York State Department of Social Services, SOCIAL STATISTICS, Vol. XXXVIII No. 4 (April, 1976) at 8. If only one-half that number had resided in a foster family home for more than one year, these discharges would produce a potential for 10,000 automatic hearings every year. Transfers from one foster home to another—the annual number does not appear in the record—would result in yet more hearings.

But the cost does not end there. Since the foster child remains in the foster home pending the fair hearing decision, the foster parents remain eligible to receive their monthly stipend of at least \$155.* If the foster parents seek judicial review of an adverse decision and obtain a stay of the child's removal pending appeal, they will continue to receive the contractual amount for many months or even years. Even where no judicial review is sought, the normal time-lag before the rendering of a careful, complete decision after the court-ordered hearing is likely to be 30-60 days, during which foster parents will receive payments which cannot be recouped.

The combined cost of holding thousands of hearings each year, and of continuing to pay for prolonged foster care, would create a severe strain on New York's social services budget. The result would inevitably be the reduction of needed services.

* For example, foster parents contracting with the Louise Wise Agency are paid \$155.00 a month for caring for children under five, \$165.00 a month for children over five, still more for handicapped and retarded children. If multiple children are placed in one home, full multiple amounts are paid. This income is non-taxable. (Transcript of Record in the District Court [hereinafter "Tr."] Docket Item No. 84, pp. 87-89).

Thus, the District Court has misconceived the effect of its ruling. In choosing to substitute its policies for those of the New York Legislature, the majority below has contravened this Court's direction in *Labine v. Vincent*, 401 U.S. 532, 538-539 (1971) that it must be the legislature and not the federal judiciary which fashions rules to "establish, protect, and strengthen family life. . . ."

C. The District Court's ruling that hearings are necessary to prevent peremptory transfers and capricious movement of children

The decision below, in the process of justifying its hearing requirement, refers to peremptory transfers and the capricious movement of children from foster homes (A.J.S. 10a-11a) as though such arbitrary conduct were shown in the record. In fact, the record demonstrates the care, thought and extensive planning which characterizes transfers from foster homes. As pointed out by dissenting Judge Pollack, "No evidence has shown that the present procedures are conducive to or have resulted in hasty or ill-advised separations from the viewpoint of the foster child." (A.J.S. 30a).

The 10-day notice which is sent to the foster parents when a removal of the child is to be effectuated is only a small part of the process. The notice merely sets the date of final placement; the transfer, however, takes place over a much longer period of time. As Florence Creech, Executive Director of the Louise Wise Agency, and also a consultant for the Child Welfare League of America, testified (A. 276a-277a):

"This is always a very slow process, depending, of course, on the age of the child. Even a small child who speaks, a toddler, will be very much involved. The foster parents will know what we are planning, unless there should be a sudden emergency that is beyond our control, but when this is something we are planning, the foster parents would know, the natural

parents would know, the child is told, we never just take a child and just move that child.*

"It is done slowly, with the child having the opportunity of getting acquainted with the people where he is going, and I am putting it that way because where he is going might be back to his own family, might be to an adoptive home, might be to another foster home. But it would be a slow process, with the new adults becoming acquainted with the child, with the child visiting in the home, perhaps for an overnight visit. How much contact there would be, how slow it would be would depend on the age of the child, where the child is psychologically, what is best for him."

The child is consulted, and the older the child the greater the weight given to his wishes. (A. 279a). The foster parents are told the name of a person familiar with the case who can answer any questions, and can also talk to the agency director. The reasons are discussed prior to the sending of the notice (A. 281a-282a).**

* See for example 18 N.Y.C.R.R. § 606.16 (effective August 31, 1976) (R.A.) which provides:

"Discharge service plan. (a) When it is determined that within the next six months, a child is to be returned to relatives, placed for adoption, helped to make arrangements for independent living, or discharged to an agency which will be responsible for his continued care, a discharge service plan shall be developed. The plan shall clearly state to whom the child is to be discharged, where responsibility for the child will lie, what services are to be provided prior to and following discharge and how they are to be provided.

(b) Implementation of the discharge service plan begins prior to the time of discharge with interviews with the child, his family, and other individuals or agencies involved in the plan to identify possible problems, evaluate the readiness of all parties to participate in the plan, and arrange for the services identified..."

Local social services departments are given up to two additional years for full implementation of the regulation.

** Although the foster parents do not have direct access to agency files, no specific information is withheld from them. It is particularly important to provide to them all psychiatric evaluations of the child (A. 282a-283a).

And, as Jane Edwards, Executive Director of the Spence-Chapin Agency (which cares for 1,300 children) testified, foster parents are told the reasons for the transfer (A. 287a), and no move is planned except as a team decision of child care professionals. (A. 289a). Most children go home to their natural parents or to an adoptive home. (A. 288a).

If an error is made, it is not in the direction of peremptory moves. As Dr. Fanshel testified after studying hundreds of transfers of foster children over a lengthy period of time. (A. 176a, Deposition, Rec. Doc. No. 93, pp. 70-71):

"No, as a matter of fact, to be critical of the agencies, it is that we would be more often likely to allow a child to remain in a situation because under the pressure of high caseloads, the pressure of inadequate supply of foster homes, it's simply easier to let Johnny stay there than to find a new home and to go through the whole hassle of replacement. So that if I were to look for error, the error would be overwhelmingly in the direction of permitting the child to stay in a home where there was question about the performance of the foster mother.

"In other words, it takes mobilization of agency effort to replace a child, which would only be called for under the most dire circumstances."

D. The District Court's holding that the agency which has custody of the foster child needs "an organized forum in which to gather information"

While making no examination of the harmful effect which the automatic hearings it decreed would have on the children, the parents and the State, the majority of the Court below also devoted little analysis to any possible purpose which such hearings might serve. It simply stated that the agency would gain "an organized forum in which to gather information concerning, *inter alia*, the frequency with which the biological parent has been visiting his or

her child." (A.J.S. 12a). This statement overlooks the extensive regulations already requiring the compilation of facts concerning the relationship of the child to its own parents and to the foster parents.

The agency is required to visit the child in foster care, to maintain planned and regular contacts with the natural parents, and to supervise all major decisions in the child's life. Pursuant to New York Social Services Law § 372, 18 New York Codes Rules and Regulations ("N.Y.C.R.R.") § 450 *et seq.* and pursuant to customary social work practice, agencies maintain detailed case records with respect to the children and the natural parents, as well as the foster parents.* Indeed, appellees' witness Dr. Marie Friedman acknowledged that the agencies have "information beyond what anyone needs to make any kind of a decision. . . ."** Clearly, lack of information is not a problem.

Visiting by the parents, the single example cited by the court, is very strictly supervised by the agencies. (A. 275a). Such visits are planned and scheduled in advance and generally take place at the agency office. As has been set out in detail at pp. 8-9 *supra*, standards for visiting—and even for the quality of such contacts—are established by statute and failure to meet such standards is a basis for termination of parental rights. Family Court Act, § 611; N.Y. Soc. Serv. Law § 384-b(1)(b).

Thus, the social work team which makes transfer decisions already has access to the parties permitted to par-

* See 18 N.Y.C.R.R. § 606.15(b) (1976) which requires that the agency provide counseling of parents and children (within first two weeks of placement); conduct interviews with the child every two weeks and counseling with the family at least every two weeks (during first three months of placement); conduct visits with child and family at least monthly (during fourth through twelfth month); maintain monthly contacts with child and family (following first year of placement).

** Tr. 17.

ticipate in the hearing which would be required by the decision below, and can develop all the necessary information through the interview and observation process commonly utilized in professional child care. As described by Judge Pollack in his dissenting opinion below, this approach is based "on the disinterested . . . judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes." (A.J.S. 30a). However, the order entered by the majority discards this process, and requires the State to formalize the inquiry by introduction of testimony before a hearing examiner.

The vagueness of the "best interests" test is particularly apparent when there is an attempt to judicialize the procedure for making the decision. If a child is healthy and doing well at school while in a foster home, does that mean that he would do as well in the parental home? Better? Would he be less well adjusted? Could enough personnel be made available to provide extensive psychological examination before each automatic hearing, to answer these questions and to provide psychiatric testimony on which findings could be made?

At such a hearing, the natural parents would be at a substantial disadvantage in making a presentation because of their lack of financial resources.* Yet, as the Court noted in *Bennett v. Jeffreys*, 40 N. Y. 2d 543, 549 (1976), there is an inherent inequity in custody disputes where one side "may not have the means to retain their own experts and where publicly compensated experts or experts compensated by only one side have uncurbed leave to express opinions which may be subjective or are not narrowly controlled by the underlying facts."

The "organized forum" hailed by the decision below is not needed as a fact-gathering mechanism. As noted in

* Foster care is not generally resorted to except by those who cannot afford to make private child care arrangements. (A. 163a).

the dissent, under the present system in New York, "judgments [are] reasonably reached by concerned independent disinterested agencies and professionals by less starchy methods." (A.J.S. 31a). These judgments are based on evaluation of a complex of individual factors, rather than simply a "checklist" of criteria. To graft automatic hearings and judicial review onto this system would be to ignore the limitations of the adversarial process and the deleterious effect it would produce on all the participants.

POINT II

Current New York foster care transfer procedures provide adequate protection to the rights of foster children under the Due Process Clause of the United States Constitution.

A. The District Court's finding that the Due Process Clause precludes returning a child to his parents or transferring him to a more suitable foster home without an administrative hearing

This Court has repeatedly held that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Meachum v. Fano*, 427 U.S. —, 96 S.Ct. 2532 (1976). A constitutionally cognizable liberty interest can either find "its roots in state law", *Meachum v. Fano*, *supra*, 96 S.Ct. at 2539 or "originate in the Constitution." *Ibid*.

In this case, neither of those sources creates a protectible interest on the part of a child in the preservation of his live-in relationship to a particular set of foster parents who provide him with temporary care pursuant to contract rather than an adoptive home. The District Court majority thus erred in imposing upon New York's foster care system a hearing requirement wholly at odds with the purpose and design of that system.

Appellees raised no claim below that New York law gives a foster child a cognizable liberty interest in the foster care transfer situation.* Rather, they sought to assert a right under the Constitution superior to New York law. That right was to be grounded, appellees contended, in judicial acceptance of the psychoanalytical concept of the "psychological family." Yet this doctrine is simply one of several competing theories as to the quality and depth of attachments formed in foster care, and appellees offered only the anecdotal recollections of their selected psychiatric witnesses to support it. As shown above, the only empirical evidence in the record, the study conducted by Dr. David Fanshel, demonstrates that number of placements has no significant relation to adjustment. In simplest terms, appellees never proved their case.

Thus, it would be singularly inappropriate for the Federal judiciary to invalidate the state provisions herein simply for being "incompatible with some particular economic or social philosophy", *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42-43 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156 (1973). This Court has expressed its reluctance "to disallow the States to experiment further

* As noted previously, New York law unequivocally holds to the contrary. See pp. 3-8, *supra*.

and to seek in new and different ways the elusive answers to the problems of the young" *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (jury trial not constitutionally mandated in state court juvenile delinquency proceedings). That preference bears special weight in the difficult, multi-faceted circumstances presented in foster care.

Insofar as the decision of the District Court majority is predicated upon a finding of a "grievous loss", it misconstrued the constitutional dimension of that concept. This Court has unequivocally rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause". *Meachum v. Fano*, *supra*, 96 S. Ct. at 2538 (emphasis in original). In *Meachum*, the Court held that a prisoner was not entitled to a hearing or other due process protections prior to his transfer from one institution in the state prison system to another, even where the transfer produced a substantial adverse impact on the individual. *Ibid.* *Meachum* is dissimilar from the instant case in that the liberty of an incarcerated person to choose his own place of residence is curtailed as the result of a conviction. However, its rationale sheds light on the scope of protected liberty interests generally. It was held that no procedural protections were necessary in that context because transfers "often involve no more than informed predictions as to what would best serve . . . the safety and welfare" of the persons involved. *Ibid.* This Court therefore declined to require procedural protections which "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of . . . administrators rather than of the federal courts." *Ibid.*

Moreover, while in *Meachum* the Court recognized the danger that at least some prison transfers might be effected for punitive purposes, in the foster care situation

no such danger exists. There is no occasion in which the relationship of the agency to the child is adverse or self-interested. Rather, the sole reason for every transfer is the agency's determination, based on its experience and expertise, of what would best serve the safety and welfare of the child. In the case of a return home, this determination is also based on the express request of the child's parent. Cf. *Meachum*, *supra*, 96 S. Ct. at 2538. The absence of antagonism between the agency and the child sharply distinguishes the foster care transfer situation from the usual context in which this Court has found cognizable Fourteenth Amendment interests. Cf. *Goldberg v. Kelly*, *supra*; *Bell v. Burson*, *supra*; *Morrissey v. Brewer*, *supra*; *Wolff v. McDonnell*, *supra*; *Board of Regents v. Roth*, *supra*. Even more than in the teacher-student classroom relationship, the foster child-agency relationship presents the opposite of a "typical 'conflict of interest.' Rather, the relationship traditionally is marked by a coincidence of interests". *Goss v. Lopez*, 419 U.S. 565, 594, n. 13 (1975) (POWELL, J., dissenting) (right to informal hearing prior to suspension from school).

This Court "long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults", *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. —, 96 S. Ct. 2831, 2843 (1976) (state statute conditioning abortion by minor on parental consent invalidated), and that it may in some situations impose upon children restrictions that would be "constitutionally intolerable for adults", *Ginsberg v. New York*, 390 U.S. 629, 650 (1968) (STEWART, J., concurring in the result) (State ban on sale of sexually-oriented literature to minors upheld), even in so paramount an area as the First Amendment. *Ibid.*; *Tinker v. Des Moines School District*, 393 U.S. 503, 514-15 (1969) (STEWART, J., concurring); *Prince v. Massachusetts*, 321 U.S. 158, 167-68

(1944) (state ban on employment of minors upheld on *parens patriae* grounds).*

Our society provides that the care of a child should be at all times committed to a responsible adult who has ultimate decision-making authority for the child. An adult guardian is necessary because children are "not possessed of . . . full capacity for individual choice." *Ginsberg v. New York*, *supra*, at 649-650 (STEWART, J., concurring in the result). Due process rights have been accorded to children faced with possible detention by the State, *In Re Gault*, 387 U.S. 1 (1967), where the detention could strip the child's parents of control over decisions concerning his well-being. But *cf. McKeiver v. Pennsylvania*, *supra*. However, this Court has never accorded a child any due process rights as against the decision-making authority of his own parent or legal guardian. The fact that the child's parents have temporarily given legal custody of the child to an agency which is an instrumentality of the State should not lessen the traditional reliance on the parental representative to exercise responsibility for his well-being.

An agency charged with supervision of a child in its custody operates under the aegis of two separate and distinct sources of authority. It not only has the power recognized by this Court to exercise control over the foster child in the *parens patriae* role, *Prince v. Massachusetts*, *supra*, but also acts under the authority conferred upon it by the express consent of the child's natural parents. See N.Y.

* Procedural safeguards afforded adults in many different contexts are simply inappropriate and unjustified for children. "[T]he experience of mankind, as well as the long history of our law, recogniz[es] that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss*, *supra*, at 590-91 (POWELL, J., dissenting) (emphasis in original).

Soc. Serv. Law § 384-a (R.A.). It is in this latter capacity, as well as in its *parens patriae* function, that the agency determines the most desirable foster residence for the children in its care.

This Court has observed that it is the nature of the interest under consideration which determines if constitutional protection is appropriate. See *Board of Regents v. Roth*, *supra* at 571; *Morrissey v. Brewer*, *supra* at 481; *Fuentes v. Shevin*, 407 U.S. 67 (1972). If the interest involved here—that of a foster child in his residential relationship to a particular set of foster parents—deserves constitutional recognition, then that interest must be protected regardless of whether the child is to be returned home, placed in another foster home or placed with adoptive parents. Inexorably, to accord this "interest" constitutional status would result in conferring upon the child a constitutional right to choose not to return home to his own parents. The District Court's denial of an intention to disturb New York's strongly held policy of preserving and strengthening the natural family (A.J.S. 11a) is scarcely reassuring, for the inevitable effect of its ruling, if upheld by this Court, would be to alter fundamentally that social choice. If the child has a right not to live with his parents he would acquire other rights as well—a right not to attend the school chosen for him by his parents, or a right not to undergo surgical treatment at a municipal hospital arranged by his parents. The child would also be entitled to participate in all custody proceedings between his parents, and in all divorce proceedings (contested or uncontested) between the parents. Such parents would not be able to act on behalf of their children, and since the children could not be required to safeguard their own interests, appointed counsel would step in to exercise this function. It is difficult to maintain that these revolutionary changes in social and family relationships would not obliterate the "local judgment" (A.J.S. 11a) of New York and other states.

B. The District Court's ruling that existing New York's procedures do not protect the best interests of the child

Even accepting, *arguendo*, the District Court's holding that a child has a constitutionally protected liberty interest in his relationship to particular foster parents, that court erred in determining "the nature of the process that is due." *Morrissey v. Brewer*, *supra*, at 484. This Court has established that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) and that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, *supra*, at 481.

The District Court ordered the defendant social services officials to conduct a hearing in every case prior to authorizing the transfer of any foster child in the plaintiff class* from a foster home in which he has resided continuously for at least one year. At the hearing the natural parents, foster parents, child and agency may all present information to the administrative decision-maker. In addition, the child is to be represented by a disinterested adult whenever in the judgment of the agency the child's age, sophistication and ability to communicate his own feelings warrant it. These hearings are to be *automatic*, with no request for such a hearing from any participant required. The District Court's order thus exceeds any due process scheme ever mandated by this Court.

The District Court's rejection of New York's present legislative scheme as inadequate under due process standards is particularly surprising in view of the extensive and continuing legislative and judicial scrutiny given to the

* The District Court allowed an exception in emergency situations and in cases where the removal occurs pursuant to court order or is initiated by the foster parents. See A.J.S. 37a.

best interests of the child in the New York foster care system. As described *supra*, New York has an intricate and indeed evolving scheme of safeguarding the interests of all participants in its foster care system. That scheme *inter alia* provides foster parents with an informal conference prior to removal at which they can present reasons why the child should remain in their home, 18 N.Y.C.R.R. § 450.10, and allows a full fair hearing to the foster parents after removal. N.Y. Soc. Serv. Law § 400. After 18 months of foster care, a child comes under the jurisdiction of the New York Family Court, and the foster parents can invoke that jurisdiction at any time, including immediately prior to the child's removal, to obtain a foster care review proceeding before that court. N.Y. Soc. Serv. Law § 392. At this hearing, the court may direct the continuation of foster care, the return of the child to his natural parents, the institution of a proceeding to free the child for adoption, or the placement of the child for adoption with the foster parents or another family. The sole criterion for the decision is "the best interest of the child". N.Y. Soc. Serv. Law § 392(7).*

The District Court majority, however, was dissatisfied with this hearing and review provision. Expressing, as the dissent noted, a "social policy preference for a one year rather than the present statutory . . . period" (A.J.S. 30a), it required that an administrative hearing be available after twelve months despite the full *judicial* hearing

* It should be noted that the § 392 hearing permits a Family Court judge to weigh the natural parents' fulfillment of the obligations of parenthood which continue during foster care. A parent's failure to maintain substantial affectionate contacts with his child while in foster care may be the basis for a proceeding to terminate the natural parent's rights. The statute specifies that a visit by a parent "which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." N.Y. Soc. Serv. Law § 384-b(7)(b). The full text of this provision is set out at p. 8 *supra*.

now available at eighteen months.* This preference has no basis in logic or in the record. None of plaintiffs' witnesses testified that one year was a particular turning point in foster care. Indeed, counsel for plaintiffs conceded that the one year duration did not mean that the natural parents had abandoned or ceased to love their children. (Tr. 172). Further, even when a parental request for return of a child is made before one year of foster care has passed, the child might not be removed from foster care until after the expiration of the year. (A. 308a). Nor does the agreement signed by parents when they place children in voluntary care state that the parents' rights will diminish after one year.

The only pertinent testimony concerning the one year foster care relationship was that of Dr. Fanshel, who stated after a longitudinal study of hundreds of foster children that the one year period has no significance in assessing the effect of transfers from foster homes. (A. 177a).

Further, the majority below held that § 392 was inadequate because it could not be invoked by the child, but only by the foster parents. The court rested this judgment upon its previous finding that there was a potential conflict of interest in this case between the foster children and the foster parents which required the appointment of separate counsel. (A.J.S. 14a). However, such a conflict

* At trial appellee Goldberg described the Rafael Serrano § 392 proceeding as follows:

"Q. Were you present at the 392 hearing? A. Yes.

Q. And were you permitted to speak and offer what position you wanted to offer? A. Yes.

Q. And were you apprised prior to the 392 hearing that such a hearing would be held? A. Were we apprised that there would be a hearing?

Q. That's right. A. Yes.

Q. Was there a disposition made by the judge, if you know, at the 392 hearing? A. He said foster care [should] continue." (A. 299a).

would exist only with respect to *determining* the rights of foster parents and foster children, not with respect to the *exercise* of the children's rights. If the foster parent wants the child to remain in his home, then he will act on the child's behalf and exercise the child's right to a prior hearing. If he does not, the child could not happily remain in the household. Since there is no conflict of interest between foster parent and foster child if both want the child to remain, the court's rationale for rejecting the procedures embodied in § 392 wholly lacks a logical foundation. Indeed, it actually contradicts the court's interest in the "continuity" of the foster care relationship, since such continuity depends on mutual consent between foster parent and child.

In view of the substantial identity of interest between foster children and foster care agencies (public and private), the small likelihood of an ill-conceived or improper removal or transfer under existing provisions, the minimal value of an additional administrative hearing and the substantial fiscal and administrative burden of conducting such a hearing automatically before every removal or transfer, this Court should decline to hold that the Constitution mandates the procedures required by the majority below. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

New York's evolving law concerning the rights of children in foster care, set out at pp. 3-9 above, more than meets constitutional requirements. It is a creative and balanced approach which is far more likely to guarantee permanence in a child's life, through reunion with his family or adoption, than is the attenuation of temporary foster care.

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York, December 17, 1976.

Respectfully submitted,

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DEC 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, etc., *et al.*,*Appellants,*

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,*Appellees.*

No. 76-183

BERNARD SHAPIRO, etc., *et al.**Appellants,*

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,*Appellees.**(continued)*

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5200

DANIELLE GANDY, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR INFANT APPELLANTS GANDY, *et al.*

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The Opinions and Orders of the District Court and the "Answer" of Court Appointed Counsel for the Children are Contained in the Joint Appendix to the Jurisdictional Statements, hereinafter referred to as Joint Appendix.

Certain specified Statutory Provisions Appear as Appendices to the Brief of Appellants Rodriguez in Accordance with an Agreement Confirmed in a Letter to Michael Rodak, Jr. Clerk of the Supreme Court and are so identified.

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BRIEF FOR INFANT APPELLANTS GANDY, *et al.*

OPINIONS BELOW

The majority and minority opinions of the three-judge District Court for the Southern District of New York granting declaratory and injunctive relief are reported at 418 F. Supp. 277. They are printed in Appellants' Joint Appendix to Jurisdictional Statements, [hereinafter "Joint Appendix"] at pp. 1a-35a. The opinion of United States District Judge Robert L. Carter dated December 10, 1974, appointing separate counsel for the infant Appellants is not reported and is printed in the Joint Appendix at pp. 54a-68a. The opinion granting motions to certify classes of foster children, natural parents and foster parents is not reported, and is printed in the Joint Appendix at pp. 42a-50a.

GROUND OF JURISDICTION

The final Order and Judgment appealed from was entered in the District Court on April 14, 1976. (Joint Appendix pp. 36a-38a). The notice of appeal to this Court was filed in the District Court on June 16, 1976, (Joint Appendix pp. 41a-41c).

The Jurisdictional Statement was filed August 6, 1976, and probable jurisdiction was noted by this Court on October 12, 1976.

The jurisdiction of this Court rests on 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS, AND STATUTES AND REGULATION INVOLVED

Fifth Amendment to the Constitution:

No person shall be . . . "deprived of life, liberty, or property, without due process of law; . . ."

Fourteenth Amendment to the Constitution:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 383(2) and 400 of the New York Social Services Law, and 18 New York Codes, Rules and Regulations §450.10 are produced in the Appendix to

Brief of Appellants Rodriguez et al., pp. 51-53a. Sections 385.3, 395, 398 are appended to this Brief pp. 3a-12a. Sections 384-a, 384-b, 392 are reproduced in Appendices "2" to "8" attached to the Brief of Appellants Rodriguez et al.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the New York legislative policy with respect to children in foster care, of returning the children to permanent homes with their parents or adoptive parents without unnecessary delay, is a valid government objective.

(a) If so, whether §§383.2 and 400 of the New York Social Services Law and New York City Rules and Regulations §450.14 (declared unconstitutional as applied, in the order on appeal) are rationally related to the accomplishment of the government objective.

2. Whether a child in a foster home for more than a year has a constitutional right to an adversary hearing before the child is removed from the foster home to be returned to his or her parent, or to be sent to live with a family wishing to adopt the child, or is to be removed for any other reason.

3. Whether the Federal District Court, in directing the conduct of evidentiary hearings on notice before a child, who has been in a foster home for more than a year may be removed from such home, exercised a legislative function.

4. Whether a fit parent whose child has been in a foster home for more than a year, has a constitutional right to the care and custody of his or her child.

(a) If so, whether that right is impaired by an order directing a compulsory adversary hearing, which could result in a determination that the child should

not be returned to his or her parent, and an administrative and Court review of the decision made after the hearing.

STATEMENT OF THE FACTS

This action relates to the rights of children in New York who have been placed *temporarily* with foster parents, and the rights of their parents¹ and foster parents.

Parents who are unable to adequately care for their children for a time may commit them for temporary care to the County or City Commissioner of Social Welfare.² The Commissioner may place the child directly with a foster parent or delegate the placement and supervision of the foster home to a private social agency.³ Temporary placement of a child with a foster family is governed by a written agreement between the Commissioner or social agency and the foster parent, which includes an undertaking by the foster parent to assist the child to return to his or her natural parent (A. 76a). There is a provision in the agreement for payment to the foster family to cover the cost of care of the foster child (A. 76a).

To the extent possible, foster parents are selected by the Commissioner or by the authorized agency to meet the particular needs of a child. An infant may be placed

¹ The term "parent" as used in this brief refers to a child's natural or biological parent.

² New York Social Services Law §398 (Appendix to Brief, p. 4a).

³ New York Social Services Law §395 (Appendix to Brief, p. 4a).

with an elderly woman who enjoys caring for very young children. If the placement is prolonged and the foster parent is unable properly to supervise an active child, the child may be transferred to younger foster parents. One of the principal reasons for removing a child from a foster home is that his or her parent is able to and wants to care for the child. Another reason for removal, when a child has been freed for adoption, is to place the child with a family that intends to adopt him or her. Still another reason for removal may be that a foster parent was discouraging the development of a relationship between a child and her or his parent during the time the parent was unable to assume full responsibility for the child.

New York Social Services Law⁴ §392(2) provides for review by the New York Family Court of the status of each child who has been with a foster parent eighteen months. Similar proceedings are conducted every two years thereafter (or at shorter intervals if the Court deems it appropriate). Such review is on notice to the foster parents and the natural parents, and the child is present during the proceeding unless the Court, in its discretion, dispenses with the child's appearance. All the parties, may be represented by counsel in the proceeding and the children are represented by Law Guardians. The Court, after hearing, determines whether the best interests of the child require the continuance of foster care, or the return of the child to his or her parent or a relative, or the institution of proceedings to legally free the child for adoption, Social Services Law §392.7 and 9. The Family Court may also direct an authorized agency "to encourage and strengthen the parental relationship" and to assist the parent "in

⁴ Hereafter referred to as "Social Services Law."

obtaining adequate housing, employment... or psychiatric treatment", Social Services Law §392. The Family Court's decisions must be based on the child's best interests. That is true in all cases in New York involving the custody or care of a child.

This action was brought by an association of foster parents and individual foster parents who feared that their foster children are to be wrongfully removed from their homes (A. 15). Also named as Plaintiffs are children who had been placed with the foster parents for care. All the Plaintiff children were under the age of 12 when the action was instituted.

Because this action was brought by one attorney acting for all Plaintiffs, — the foster parents, the Association of Foster Parents and the foster children, — the Court, to avoid the possibility of a conflict of interest, appointed Helen L. Bittenwieser counsel for the children.

In affirming his determination to appoint separate counsel for the foster children, Judge Carter wrote (Joint Appendix 58a-59a):

"Upon examination of the pleadings, the court was most concerned that all of the allegations of the complaint were based on the uncritical assumption that the rights and interests of the children are identical to those of the foster parents. . . ."

The foster parents contended in the Court below that after children are with foster parents for a year, a right of family privacy arises, which entitles temporary foster parents to the same constitutional protections afforded to parents. They argued that, as children may not be taken from their parents, they may not be removed from the custody of foster parents with whom they have been living for a year, without a prior adversary hearing. The District Court ruled that foster parents with whom children have been placed temporarily do

not have a constitutional right in their relationship with the foster children (Joint Appendix 8a-9a). The Court below held, nevertheless, that before a child who has been with a foster parent for a year or more, may be taken from the foster home, an adversary hearing before an "administrative decisionmaker charged with determining the future placement of the child" is constitutionally mandated (Joint Appendix 10a).

The District Court discussed, in its decision, the review of the status of children in foster care for eighteen months, provided for by Social Services Law §392 and the periodic review by the Family Court thereafter. In the order on appeal, the Court excepted from its injunction against removal, without a prior evidentiary hearing, of all children in a foster home for more than a year, only (1) the removal of a child pursuant to Court order and (2) the removal of a child at the request of the foster parent (Joint Appendix 37a). Thus, an adversary hearing is required under the District Court's order when a child has been in foster care eighteen or more months, after the Family Court shall have conducted a full adversary proceeding in which the child shall have been represented, (unless the Family Court ordered the removal of the child).

There is no basis in the record for the assumption that foster children's best interests are not considered and served by the Commissioner of Social Welfare or the authorized agencies charged with supervising the foster care of children, under the existing statutes. Commissioners and agencies are fallible, of course, and in particular cases may make questionable decisions. There is no reason to believe, however, and there is no evidence in this proceeding to indicate, that such decision will not be corrected under the existing laws and regulation or that, in the great majority of cases, the existing procedures are not more diacritical in

perceiving the needs and interests of foster children, than the kind of hearing ordered by the Court below.

The order of the Court below is in conflict with Section 384-a of the Social Services Law. That statute was enacted in 1975,⁵ while this case was pending, and several months before the decision of the lower Court was announced and the order on appeal was made. Section 384-a provides that when a parent transfers a child to an authorized agency by written instrument providing that the child is to be returned to the parent so long as the parent is capable of caring for the child, on a date certain, or upon the occurrence of an identifiable event, such agency shall "*return such child at such time*"⁶ . . . unless there is an existing order to the contrary.⁷ Section 384-a also provides that if the written arrangement between the parent and agency does not specify a date or identifiable event upon which the child is to be returned, the "agency shall return the child within ten"⁸ days after having received notice that the parent . . . wishes the child returned."

Assigned counsel to the foster children named as Plaintiffs in this case, is of the belief, based upon more than forty years experience in the placement of children for foster care, that the interests of children who have been with foster parents more than a year will be best served by reuniting them with their parents

⁵ It was re-enacted with additional provisions in 1976.

⁶ Emphasis added.

⁷ Obviously, if there is to be a hearing before an administrative officer before a child is returned to a parent, in accordance with the direction of the Court below, the administrative officer may decide that the child is not to return to the parent as provided in Social Services Law §384-a, but is to remain in the foster home.

⁸ Increased to twenty days by the 1976 amendment.

who are able to, and who want to, care for them.⁹ As the Court below noted in its opinion, the assigned counsel to the foster children is also of the opinion that the existing rules and the existing procedures, in which disinterested professionals participate, are less likely to disturb foster children and are more likely to "elicit the sensitive and personal information" requisite to a decision with respect to the children's best interests, than the formal adversary proceeding, with its concomitant tensions, mandated by the Court below (Joint Appendix 16a).

POINT I

THE COURT BELOW, IN DIRECTING THE CONDUCT OF ADVERSARY PROCEEDINGS BEFORE A CHILD MAY BE REMOVED FROM A FOSTER HOME, EN-CROACHED UPON THE DOMAIN OF THE NEW YORK LEGISLATURE.

"The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Mr. Justice Holmes, quoted in *Federal Trade Com. v. Jantzen*, 386 U.S. 228, 235.

The guardianship of children in need of protection is the function of the state in which the children live. *Ex Parte Burrus*, 136 U.S. 586, 594; *Ginsberg v. New York*, 390 U.S. 629, 639; *Labine v. Vincent*, 401 U.S.

⁹If the best interest of the child will not be served by his or her returning to a natural-parent, that may be determined in administrative proceedings or by a court under existing laws and regulations.

532, 540. *Ex Parte Burrus*, 136 U.S. 586, involved the custody of a child. This Court held that a federal district court was in error in accepting jurisdiction of the matter, for a federal court can "not exercise the common law function of *parens patriae*." (136 U.S. at p. 594)

The New York legislature adopted a policy of restoring, without unnecessary delay, the relationships between children placed temporarily in foster care and their parents, when their parents are able to take care of them. When parents are not able to provide a proper home or have demonstrated a lack of concern for children in foster care, it is the policy of the New York legislature to find other permanent homes for the children and to end their temporary care, again without unnecessary delay. The legislative policy obviously was adopted in the children's best interests, as well as (when children are to be returned to their parents) the interests of their parents. In furtherance of the policy, the legislature directed that when children in temporary foster homes are to be returned to their parents, they are to be returned without formality, as soon as the parents seek the return of the children and are capable of properly caring for them. The legislative policy as enunciated in its findings in Social Services Law §384-b(1)(a) (enacted in 1976 but obviously applicable to the statutes in effect when the order on appeal was made) is:

"(i) it is desirable for children to grow up with a normal family life in a *permanent*¹⁰ home and that such circumstance offers the best opportunity for children to develop and thrive;

"(ii) it is generally desirable for the child to remain with or be returned to the natural parent

¹⁰Emphasis added.

because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered."

Social Services Law §384-b(1)(b)

"The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens.

* * *

The legislative policy set forth in Social Services Law §384-b was endorsed by The Citizens' Committee for Children of New York, Inc., Legal Aid Society, N.Y.S. Council of Voluntary Child Care Agencies, Association of Family Court Judges, City of New York, N.Y.S. Department of Social Services, Federation of Protestant Welfare Agencies, New York Council on Adoptable Children, and New York State Citizens' Coalition for Children.¹¹

Under the New York legislative scheme, children in foster homes must be returned to a fit parent at an agreed time or upon the occurrence of a specified event, without prior adversary proceedings.¹² It may fairly be assumed, as previously stated, that the New York legislative policy is dictated in part by the legislature's conclusion that parents will be discouraged

¹¹See letter of State Senator Pisani, Senate sponsor of the bill, to counsel to the Governor in Appendix to this brief at p.

¹²Unless there is a prior Court order to the contrary.

from placing children in foster care if, when a child's return is requested, there must be adverse hearings and a possible adverse decision, administrative review and Court review.¹³ The legislature must be deemed to have determined that such encouragement and assurance to parents will better serve the interests of the greater number of children, despite the possibility of transient damage to a child caused by the termination of his or her temporary relationship with a foster parent.

Under the New York legislative scheme, a full inquiry is conducted by the Family Court after a child has been in a foster home a year and a half and every two years thereafter. (Social Services Law §392) In the Family Court hearing in which all concerned parties are heard, and which meets all the requirements of due process, the Court may determine that the child should be continued in foster care, or that he or she should be returned immediately or in the future to a parent or relative.

The State (and the City of New York) enacted a number of other laws and regulations to safeguard the interests of a child in foster care against removal from a foster home when that is not in the child's best interests. There is a ten day notice and pre-removal conference with the foster parents, when the child is to be removed to another foster home.¹⁴ There are provisions for administrative hearings to determine the advisability of removing a child from a foster home.¹⁵

¹³Social Services Law §385.3; Article 78 New York Civil Practice Law and Rules.

¹⁴18 N.Y.C.R.R. §450.10. As promulgated, the regulation also applied to children to be returned to their parents. The rule has, we believe, been superseded, to the extent it applied to the return of children to their parents, by the enactment of N.Y. Social Services Law §384-a.

¹⁵Again, we assume that the hearings are not to be conducted when a child is to be returned to a parent.

(It is conceded that such proceedings do not meet all the requirements of due process.) The administrative determination and the reasonableness of the decision are subject to review by the Supreme Court of the State of New York, or an Appellate Division of that Court.¹⁶ A foster parent who believes a child should not have been removed, may also institute *habeas corpus* proceedings for the return of the child after he or she has been removed. All the demands of procedural due process are complied with in the several court hearings referred to.

The Court below, although it is not expert in child care, and there was little in the record to guide it, disagreed with the state legislative policy. The District Court determined that the state's interest as *parens patriae* in protecting children who are in foster care requires a full adversary hearing by an "administrative decisionmaker" before a child who has been in a foster home for a year may be removed from the foster home, whether the child is to be returned to his or her parent, or placed with an adoptive parent or is to be removed for any other reason (Joint Appendix 10a). The District Court in this case found existing state laws and procedures inadequate for the protection of a child in a foster home for a year or more (Joint Appendix 99). There is nothing in the record to justify the Court's determination that its policy and the procedure it ordered, are wiser and will better serve the interests of the greater number of children requiring foster care, than the policies adopted and procedures mandated by the state. See *Ferguson v. Skrupa*, 372 U.S. 726.

Although the Court below acknowledged that "the welfare of the child is best served by a speedy and final

¹⁶Article 78 N.Y. Civil Practice Law and Rules and Social Services Law §385.3.

decision as to his fate" (Joint Appendix 16a), it disagreed with the New York legislative policy of restoring a child to his or her fit parent, or transferring the child for adoption, quickly and without extended prior hearings. The District Court declared "the pre-removal procedures presently employed by the state are constitutionally defective." (Joint Appendix 9a).

The District Court ruled that to avoid "the possibility of arbitrary or misinformed action", a pre-removal hearing is required whenever a child is to be taken from a foster home in which he or she lived a year or longer (Joint Appendix 10a). "We hold", Judge Lumbard wrote for the District Court, "that before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any information to the administrative decisionmaker charged with determining the future placement of the child." (Joint Appendix 10a).

The District Court acknowledged that under existing New York law "[t]he continuing jurisdiction of the Family Court constitutes a safeguard against arbitrary state action." (Joint Appendix 14a). But the Court ruled that the proceeding in Family Court is not an adequate remedy, for the matter must be brought to the Family Court's attention, and the prevention of the improper removal of a child "cannot be made to depend upon the initiative of third persons." (Joint Appendix 14a).

Whether the best interests of children in foster care will be served by the speedy return to a fit parent or to a family interested in adopting the child (as the New York legislature directed) or by a prior adversary hearing with respect to the possible disadvantages of

removing a child from a foster home (as the Court below directed) should not be determined by this Court. "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages" of one or the other policy. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487.

The decision of the District Court and the substitution of its social judgment for that of the New York State legislature was an "intrusion by the judiciary into the realm of legislative value judgment" *Ferguson v. Skrupa*, 372 U.S. 726, 729. And the intrusion in this case was in an area in which the District Court does not have jurisdiction or competence. As Mr. Justice Black wrote in *Ferguson v. Skrupa*, 372 U.S. at page 730 "courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . elected to pass laws." That is true particularly in a case such as this where a federal court is intruding upon an exclusive state legislative function. See *Younger v. Harris*, 401 U.S. at p. 681; *Hoffman v. Pursue, Ltd.*, 420 U.S. 592, 603-04.

The New York statutes held unconstitutional, as applied, by the Court below, together with the several other New York statutes and regulations enacted to protect children in foster care, are reasonably and rationally related to the accomplishment of the valid objective of the New York Legislature. The Court below therefor erred in striking the procedures provided for by the New York Legislature, and in substituting one devised by the Court. *Labine v. Vincent*, 401 U.S. 532, 537-540; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483.

The right that the Lower Court held is being violated by the statutes held unconstitutional, is the right of a child who has been living with a foster parent for more than a year, to remain with the foster parent until it is

determined in an adversary hearing whether the child should be removed from the foster home. The Court below did not, in holding the New York statutes unconstitutional as applied, define the right sustained as a fundamental right or as one derived from a particular Constitutional provision or amendment. The right did not exist before the Lower Court's decision was announced and there is no legal, constitutional or social basis for the recognition of the right. The protection of any such right does not, as the New York Legislature determined, serve a foster child's best interests when the child is to be returned to his or her fit parent or is being placed in a home where it may be adopted. As shown in the next point, the Lower Court's order for the protection of the right it created, cannot accomplish the Court's stated objective.

POINT II

THE ORDER UNDER REVIEW IMPAIRS A CONSTITUTIONALLY-PROTECTED RIGHT AND IS NOT RATIONALLY RELATED, TO THE ACCOMPLISHMENT OF THE LOWER COURT'S OBJECTIVE.

The order of the District Court directed the conduct of administrative hearings whenever children are to be removed from a foster home in which they have been living for more than a year. At the hearings ordered the parents, foster parents and, in some circumstances, the children involved, are to present information with respect to the advisability of such removal (Joint Appendix 16a).

If hearings are to be conducted prior to the return of a child to his or her parent, the hearings will, at the least, delay, and may prevent, the child's return to his

or her parents. The hearings ordered obviously may result in a decision by the "administrative decision-maker" that although the parents want to resume care of their children and are capable of doing so, the children's return is deemed inadvisable. If such decision is not contemplated, there would be little purpose in conducting the hearings.¹⁷

A parent's right to "the companionship, care, custody, and management of his or her children"^{17a} is a fundamental, constitutionally-protected right. *Meyer v. Nebraska*, 262 U.S. 390, 399; *Stanley v. Illinois*, 405 U.S. 645. As the Court wrote in *Prince v. Massachusetts*, 321 U.S. 158, 166, "the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply *nor hinder*."¹⁸

The administrative hearings ordered by the District Court will, in most cases, delay and hinder, and in some cases, it might defeat, the preparation for a parent's obligation (and right) to care for her or his children. The order of the Lower Court therefore, if it does not meet the requirements of due process, deprives parents of children in foster care of their constitutionally-protected right. *Meyer v. Nebraska*, 262 U.S. at p. 399. Such regulation may be justified only by some "compelling state interest", *Bullock v. Carter*, 405 U.S. 134, and if a compelling interest exists, the regulation must be strictly scrutinized to ascertain if the government's interest may be achieved by less drastic means. *Skinner v. Oklahoma*, 316 U.S. 535, 541. The

¹⁷A parent's fitness will have been previously determined. Social Services Law §384-a, as amended, permits the retention of a child so long as a parent is incapable of caring for her or him.

^{17a}*Stanley v. Illinois*, 405 U.S. 645 at p. 650.

¹⁸Emphasis added.

order under review does not serve any compelling state interest. There is no state interest in keeping the child of a fit parent in the temporary care of a foster parent, *Stanley v. Illinois*, 405 U.S. 645, 657, 658.

The order on appeal assumes without justification, at least with respect to children who are to be returned to their parents, that parents who have placed children for foster care may not thereafter be able properly to care for their children, or that their children may be served better by remaining in a temporary situation than by return to a permanent home.¹⁹ There is no basis for either assumption merely because parents may have been compelled by circumstance to place their children in foster care for a time. See *King v. Smith*, 392 U.S. 309.

The means used by the Court below to achieve its objective are constitutionally indefensible. The order on appeal "sweep[s] unnecessarily broadly and thereby invade[s] the area of [a] protected" right (namely the right of a parent to the custody and care of his or her child). *Aptheker v. Secretary of State*, 378 U.S. 500, 508. The order on appeal requires an administrative hearing whenever a child who has been in a foster home for more than a year is to be removed, unless a Court ordered, or the foster parent requested, the child's removal. Thus, an adversary hearing is also required when a child has been in a foster home eighteen months or more, despite the fact that there will have been a full, adversary proceeding, or several proceedings, before the Family Court,²⁰ and an adjudication (but not an order for removal) shall have been made determining the child's best interests. The order is

¹⁹Presumably, the same unjustified assumptions are made with respect to a child's removal from a foster home for placement with a family that wishes to adopt it. Adoptive parents are, of course, previously screened.

²⁰Pursuant to Social Services Law §392.

unnecessarily broad also in requiring an adversary hearing before every child, who has been in a foster home for more than a year may be removed, despite the fact that generally the foster parent, and the child, do not want, and have no interest in, such hearings.

The proceedings mandated by the Court are not rationally related to the accomplishment of the Court's stated objective. Although designed to protect children in foster care (Joint Appendix 15a), there is no provision for the appointment of an adult to represent a child's interests in the proceedings ordered by the Court, unless the child does not need such assistance. The order provides for appointment of an adult to represent a child when it is determined that "the child's age, sophistication and ability effectively to communicate his [or her] own true feelings warrant such appointment." (Joint Appendix 16a). Presumably, a child who is able to communicate his or her feelings may make them known to the "decisionmaker," without the assistance of a guardian or advocate. Children who cannot articulate their needs are left without representation, despite the lower Court's recognition that the foster parents may have an adverse financial interest (Joint Appendix 14a) and despite the Court's objection to existing procedures on the ground that "the foster child whose future is at stake does not participate" (Joint Appendix 12a).

The narrow restriction of the District Court's order defeats its purpose. It is designed, as the Court wrote, to assure continuity of the personal relationship of a child in foster care (Joint Appendix 16a). The Court held that its decision was, of necessity, limited to "children in foster care for one year or longer" (Joint Appendix 10a). The Court further limited its order to children in foster homes "in which they have lived continuously for more than one year". (Joint Appendix

37a). Thus, children in foster care for more than a year who have not been in any one home for as long as a year, and who for that reason are more vulnerable, are not in any way affected by the order on appeal.

As noted in the preceding point, the order on appeal conflicts with the provisions of Section 384-a of the Social Services Law requiring the immediate return of a child to her or his fit parent at a specified time or under specified circumstances. When the time or circumstance for the return of a child occurs after a child has been in a foster home for a year, the authorized agency will be compelled to violate the statutory command that it "shall return such child at such time"²¹ or it will be required to violate the order on appeal enjoining it from attempting to remove a child from her or his foster home without notice and a hearing. We assume the District Court would not demand compliance with its order when compliance would violate Social Services Law §384-a.

CONCLUSION

FOR THE REASONS OUTLINED THE ORDER OF THE DISTRICT COURT UNDER REVIEW, SHOULD BE REVERSED.

Respectfully submitted,

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On the Brief:

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²¹Social Services Law §384-a-2.



JOSEPH R. PISANI
38TH DISTRICT
WESTCHESTER COUNTY

1a
THE SENATE
STATE OF NEW YORK
ALBANY
12224

July 12, 1976

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York 12224

RE: S.8850-A (Ten-Day bill)

Dear Mr. Gribetz:

My bill, S.8850-A, is now or will soon be before the Governor for Executive action. In response to your request for comments and recommendations concerning this bill, which is multisponsored by Senators Dunne and Halperin and which was introduced at the request of the Temporary State Commission on Child Welfare, I am enclosing herewith a copy of a memorandum in support thereof.

The bill constitutes a long-overdue recodification and modernization of the present inadequate and antiquated State law on the subject of termination of parental rights and statutory provisions related thereto. It is the product of over a year of intensive research conducted by the Commission for the State Department of Social Services in a Title IV-B funded project entitled,

"Barriers to the Freeing of Children for Adoption". A copy of the Commission's full report has been provided to your office and to other Executive Chamber personnel. As the report states, the legislation "represents, probably for the first time, a comprehensive, unified approach to a complex, highly specialized field and its inherent and systemic problems".

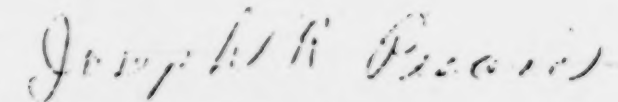
Public hearings were held by the Commission (in conjunction with the Assembly Standing Committee on Child Care) on the original draft of the bill on April 8 and 9 in Albany. At that time the views of concerned public and voluntary child care agencies, citizens and legal rights groups, judicial agencies and other interested parties were presented. The "A print" of the bill reflects a number of valid criticisms offered during the course of the hearings and other discussions on the bill. A copy of a staff memorandum explaining the amendments is also enclosed herewith.

I am informed that the bill is supported by almost every organization and agency in the field including, but not limited to, the following: Citizens' Committee for Children of New York, Inc., Legal Aid Society, N.Y.S. Council of Voluntary Child Care Agencies, Association of Family Court Judges, City of New York, N.Y.S. Department of Social Services, Federation of Protestant Welfare Agencies, New York Council on Adoptable Children, and New York State Citizens' Coalition for Children.

I am unabashedly proud of this bill. It strikes a delicate and thoughtful balance in its fairness to all parties and promotion of the best interests of children. However, my pride is edged with a feeling of profound sadness that a man who devoted countless hours of his valuable time and labor assisting in the development and drafting of the legislation passed away on the very day it passed the Legislature. Shad Polier's efforts on

behalf of the children of this State, not only on this bill but on numerous statutes during the last few decades, on the subject of foster care, adoption and child protection, will remain as a legacy of his selfless and humanitarian service. Inasmuch as I know Mr. Polier regarded this bill as a significant element, if not the acme of his long and distinguished career, I would respectfully request that the Governor, should he approve the legislation, send a "pen certificate" (or other appropriate gesture) to Mr. Polier's widow, former Family Court Judge Justine Wise Polier, as a fitting tribute to a man to whom we all owe a debt of gratitude.

Sincerely yours,



Joseph R. Pisani
STATE SENATOR

New York Social Services Law

§385. Orders; prohibiting placing out or boarding out; removal

3. Review of orders. Any person, agency, association, corporation, institution, society or other organization, aggrieved by the decision of the board in making any order pursuant to the provisions of this title, may institute, in the judicial district in which the applicant resides or has its chief office, a proceeding under article seventy-eight of the civil practice law and rules in which the reasonableness of such decision shall be subject to review.

§395. Responsibility of public welfare districts for the welfare of children

A public welfare district shall be responsible for the welfare of children who are in need of public assistance and care, support and protection, residing or found in its territory, insofar as not inconsistent with the jurisdiction of a family court. Such assistance and care shall be administered either directly by the public welfare official charged therewith, or by another public welfare official acting on his behalf by and pursuant to the provisions of this chapter, or through an authorized agency as defined by this chapter.

§398. Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children

Commissioners of public welfare and city public welfare officers responsible under the provisions of a special or local law for the children hereinafter specified shall have powers and perform duties as follows:

1. As to destitute children: Assume charge of and provide support for any destitute child who cannot be properly cared for in his home.

2. As to neglected, abused or abandoned children:

(a) Investigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible and, if necessary, bring the case before the family court for adjudication and care for the child until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child.

(b) Receive and care for any child alleged to be neglected, abused or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect, abuse or abandonment; and receive and care for any neglected, abused or abandoned child placed or discharged to his care by the family court.

(c) Report to the local registrar of vital statistics of the district in which the child was found the sex, color, approximate date of birth, place of finding, and the name assigned to any child who may be found whose parents are unknown, within ten days whenever possible after the child is found, on a form prescribed therefor by the state commissioner of health, and report the subsequent identification of any such child to the state commissioner of health; provided, however, that in the city of New York such form shall be prescribed by, and such report shall be made to the health services administration.

* * *

6. As to all foregoing classes of children:

(a) Investigate the family circumstances of each child reported to him as destitute, neglected, abused, delinquent, defective or physically handicapped in order to determine what assistance and care, supervision or treatment, if any, such child requires.

(b) Provide for expert mental and physical examination of any child whom he has reason to suspect of mental or physical defect or disease and pay for such examination from public funds, if necessary.

(c) Provide necessary medical or surgical care in a suitable hospital, sanatorium, preventorium or other institution or in his own home for any child needing such care and pay for such care from public funds, if necessary. However, in the case of a child or minor who is eligible to receive care as medical assistance for needy persons pursuant to title eleven of article five of this chapter, such care shall be provided pursuant to the provisions of that title.

(d) Ascertain the financial ability of the parents of children who became public charges and collect toward the expense of such child's care such sum as the parents are able to pay.

(e) Collect from parents whose children have been discharged to his care by the family court such sums as they are ordered to pay for the maintenance of such children and report any failure to comply with such order to such court.

(f) When in his judgment it is advisable for the welfare of the child, accept the surrender of a child by an instrument in writing in accordance with the provisions of this chapter. Any inconsistent provision of law notwithstanding, the acceptance by the social services official of an absolute surrender of a child born

out of wedlock from the mother of such child shall relieve her from any and all liability for the support of such child.

(g) Place children in suitable instances in family homes, agency boarding homes or group homes or institutions under the proper safeguards, either directly or through authorized agencies, except that, direct placements in agency boarding homes or group homes may be made by the public welfare official only if the board shall have authorized him to operate such homes in accordance with the provisions of section three hundred seventy-four-b of this chapter and only if suitable care is not otherwise available through an authorized agency under the control of persons of the same religious faith as the child. Placements shall be made only in institutions located in this state or in such institutions located in an adjoining state as are maintained by a corporation organized under the laws of this state and having authority to maintain an institution for the care of children. However, all placements shall be made in institutions visited, inspected, and supervised by the board and conducted in conformity with the rules of such board.

(h) Supervise children who have been cared for away from their families until such children become twenty-one years of age or until they are discharged to their own parents, relatives within the third degree of guardians, or adopted.

(i) Provide care in an institution, agency boarding home, or family free or boarding home for any destitute minor between sixteen and eighteen years of age who cannot be properly cared for in his own home, either directly or through authorized agencies, except that, direct placements in agency boarding homes may be made by the public welfare official only if the board shall have authorized him to operate such

homes in accordance with the provisions of section three hundred seventy-four-b of this chapter and only if suitable care is not otherwise available through an authorized agency under the control of persons of the same religious faith as the child. Such care may be continued after the eighteenth birthday of the minor and until he is discharged from care or becomes twenty-one years of age.

(j) Permit children and minors who are being cared for away from their own homes as public charges to retain up to fifty dollars per month of their earned income for future identifiable needs in accordance with the regulations of the department.

(k) In accordance with regulations of the department, make such payments for the care and support of a child or minor who has been placed out for adoption or who has been adopted, as in his judgment are necessary for the welfare of such child or minor. With respect to a child with such special, unusual or significant physical or emotional handicaps as, in his judgment, to be an obstacle to adoption he may enter into a contract with the adoptive parents subject to the approval of the department for a

* * *

(n) In accordance with the regulations of the department, is authorized to provide services to prevent the placement of children in foster care, provided, however, that such preventive services shall be authorized only if the director of the division of the budget determines, after evaluating the results of demonstration projects authorized pursuant to chapter nine hundred eleven of the laws of nineteen hundred seventy-three and chapter fifty-three of the laws of nineteen hundred seventy-four, that the preventive services provided under such projects are feasible as

effective methods for preserving and restoring family units and that providing such services would result in fiscal savings to the state and local social services districts. Such services may be provided directly or with the approval of the state commissioner of social services through purchase from any agency authorized by regulation of the department to provide such preventive services to children; however, each local social services commissioner shall, prior to providing such preventive services, make findings that the children will be placed in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with his family.

7. Notwithstanding any inconsistent provisions of law, no city forming part of a county public welfare district may hereafter assume any of the powers, duties and responsibilities mentioned in this section. However, this subdivision shall not be deemed or construed to prohibit a public welfare officer of a city forming part of a county public welfare district from exercising and performing on behalf of the county commissioner of public welfare, pursuant to the provisions of title three-a of article three, any of the powers and duties mentioned in this section. A city forming part of a county public welfare district which heretofore assumed or upon which was heretofore imposed the responsibility for providing any or all of the assistance, care and service mentioned in this section, shall hereafter continue to have such responsibility, provided, however, that the continuance of such responsibility shall be consistent with the powers, duties and responsibilities of such city under and pursuant to the provisions of title three-a of article three.

8. A public welfare official who is authorized to place children or minors in homes or institutions

pursuant to provisions of this section shall have the power to place children or minors in a public institution for children.

9. A social services official shall have the same authority as a peace officer to remove a child from his home without an order of the family court and without the consent of the parent or person responsible for such child's care if the child is in such condition that his continuing in the home presents an imminent danger to the child's life or health. When a child is removed from his home pursuant to the provisions of this subdivision, the social services official shall promptly inform the parent or person responsible for such child's care and the family court of his action.

10. Any provision of this chapter or any other law notwithstanding, where a foster child for whom a social services official has been making foster care payments is in attendance at a college or university away from his foster home, a social services official may make said foster care payments to such college or university in lieu of payment to the foster parents, for the purpose of room and board, if not otherwise provided, but such payments shall not exceed the amount that would have been paid to the foster parents had the child remained in the foster home.

§398. (As amended in 1976) Additional powers and duties of commissioners of public welfare and certain city public welfare officers in relation to children

Commissioners of public welfare and city public welfare officers responsible under the provisions of a special or local law for the children hereinafter specified shall have powers and perform duties as follows:

1. As to destitute children: Assume charge of and provide support for any destitute child who cannot be properly cared for in his home.

2. As to neglected, abused or abandoned children:

(a) Investigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible and, if necessary, bring the case before the family court for adjudication and care for the child until the court acts in the matter and, in the case of an abandoned child, shall promptly petition the family court to obtain custody of such child.

(b) Receive and care for any child alleged to be neglected, abused or abandoned who is temporarily placed in his care by the family court pending adjudication by such court of the alleged neglect, abuse or abandonment including the authority to establish, operate, maintain and approve facilities for such purpose in accordance with the rules of the board of social welfare; and receive and care for any neglected, abused or abandoned child placed or discharged to his care by the family court.

(c) Any facility designated as of the effective date of this act shall not be disapproved except after consultation with the designating appellate division.

(d) The local social services department shall list all facilities approved under this article for the temporary custody and care of children remanded by the family court and shall file a copy of that list periodically with the clerk of the family court in each county in the judicial district in which the facility is located.

(e) Report to the local registrar of vital statistics of the district in which the child was found the sex, color, approximate date of birth, place of finding, and the

name assigned to any child who may be found whose parents are unknown, within ten days whenever possible after the child is found, on a form prescribed therefor by the state commissioner of health, and report the subsequent identification of any such child to the state commissioner of health; provided, however, that in the city of New York such form shall be prescribed by, and such report shall be made to the health services administration.

[See main volume for text of 3 to 5]

6. As to all foregoing classes of children:

[See main volume for text of (a) to (e)]

(f) When in his judgment it is advisable for the welfare of the child, accept the surrender of a child by an instrument in writing in accordance with the provisions of this chapter. Any inconsistent provision of law notwithstanding, the acceptance by the social services official of a surrender of a child born out of wedlock from the mother of such child shall relieve her from any and all liability for the support of such child.

[See main volume for text of (g) to (m)]

(n) In accordance with the regulations of the department, is authorized to provide services to prevent the placement of children in foster care. Such services may be provided directly or with the approval of the state commissioner of social services through purchase from any agency authorized by regulation of the department to provide such preventive services to children; however, each local social services commissioner shall, prior to providing such preventive services, make findings that the children will be placed in foster care unless such services are provided and that it is reasonable to believe that by providing such services the child will be able to remain with his family.

[See main volume for text of 7 to 10]

11. In the case of a child who is adjudicated a person in need of supervision or a juvenile delinquent is placed by the family court with the division for youth and who is placed by the division for youth with an authorized agency pursuant to court order, the social services official shall make expenditures in accordance with the regulations of the department for the care and maintenance of such child during the term of such placement subject to state reimbursement pursuant to this title, or article nineteen-G of the executive law in applicable cases.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

FILED

MICHAEL RODAK, JR., CLERK

No. 76-180

HENRY SMITH, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-183

BERNARD SHAPIRO, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

(continued)

No. 76-5200

DANIELLE GANDY, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF APPELLANTS NAOMI RODRIGUEZ;
MARY ROBINS; DOROTHY NELSON SHABAZZ;
and LILLIAN COLLAZO**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-183

BERNARD SHAPIRO, etc., *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5193

NAOMI RODRIGUEZ, *et al.*,

Appellants,

v.

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *et al.*,

Appellees.

No. 76-5200
 DANIELLE GANDY, *et al.*,
Appellants,
 v.

ORGANIZATION OF FOSTER FAMILIES FOR
 EQUALITY AND REFORM, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLANTS
 NAOMI RODRIGUEZ, ET AL.**

OPINION BELOW

The majority opinion of the three-judge District Court (Lumbard, C. J.; Carter, J.) and the dissenting opinion (Pollack, J.) are reported at 418 F.Supp. 277 (S.D.N.Y. 1976). These opinions are also reproduced in the several Appellants' Joint Appendix to Jurisdictional Statements¹ as Appendices "A" and "B", respectively.

Also reproduced in Appellants' Joint Appendix to Jurisdictional Statements are the following:

(a) The Order and Judgment Appealed From, dated April 14, 1976, as Appendix "C".

(b) The Opinion and Order of Carter, J., dated March 22, 1976, on class certification, as Appendix "E".

(c) The Opinion and Order of Carter, J., dated December 10, 1974, on assignment of separate counsel for the children, as Appendix "G".

¹ Hereinafter referred to as A.J.S.

JURISDICTION

This class action was commenced by Appellees in the United States District Court for the Southern District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 and 28 U.S.C. §§1343(3) and 1343(4), to declare unconstitutional and enjoin the enforcement of New York Social Services Law §§383(2) and 400 and 18 New York Code Rules and Regulations §450.14.² By Order entered August 19, 1974, a three-judge Court was convened pursuant to 28 U.S.C. §§2281 and 2284. The Judgment and Order of the three-judge District Court (Pollack, J., dissenting) declaring the statutes and regulation unconstitutional and enjoining their enforcement was entered on April 14, 1976 and stayed for 30 days pending an application for a further stay to this Court. On the basis of such an application, an interim stay was granted by Mr. Justice Marshall on May 12, 1976 pending referral to and further order of the Court.

On May 24, 1976, the Judgment and Order was stayed by this Court, pending the timely docketing of an appeal or appeals, ____ U.S. ____, 48 L.Ed.2d 813 (1976). A Notice of Appeal was filed by Appellants Rodriguez, et al. in the United States District Court for the Southern District of New York on June 10, 1976 (A.J.S., Appendix "D"). Three other parties to the action also appealed (A.J.S., Appendix "D"). Separate Jurisdictional Statements were filed on August 9, 1976 by all four Appellants, and probable jurisdiction was noted and appeals consolidated on October 12, 1976, ____ U.S. ____, 50 L.Ed.2d 164 (1976). Jurisdiction on appeal is conferred by Title 28 U.S.C. §1253.

² Since renumbered §450.10 and hereinafter referred to by that number.

STATUTES AND REGULATION INVOLVED

The constitutionality of two state statutes, New York Social Services Law §§383(2) and 400, and of a state administrative regulation, 18 N.Y.C.R.R. §450.10, was directly challenged by Appellees foster parents. These have been reproduced in Appendix "1" to this Brief. Not directly challenged by Appellees, but also involved, were, *inter alia*, the following: The Due Process Clause of the Fourteenth Amendment to the Constitution; New York Social Services Law §§392, 383(1), 383(3) and 384-a; Domestic Relations Law §§110 and 111; Family Court Act §611; and Social Services Law §384-b. The text of these and other relevant Statutes, Administrative Regulations, Rules and Procedures are reproduced in Appendices "2" to "8" to this Brief.³

QUESTIONS PRESENTED

1. Did the District Court have power, under Article III, §2 of the Constitution, to determine the rights of children to notice and a prior hearing in this action, when court-appointed counsel for the children opposed such relief as harmful to children, and the foster parents, the only party who claimed this relief for the children, were disqualified from doing so?

2. Does the Constitution require notice and a hearing to children whose parents have voluntarily placed them with public officials for temporary foster care, and not for adoption, prior to return of the children to their natural parents, when the children have lived in a foster home for a year or more?

³ Hereinafter A.A.

3. Did the District Court properly certify a class of all children who have lived in a foster home for more than *one* year, regardless of their ongoing relationship with their natural parents, when the only named class representatives had spent more than *four* years in foster care and had no contact with their natural parents?

4. Was Due Process of Law under the Fourteenth Amendment denied to Appellant parents when the District Court refused to let their witness testify at the trial on March 3, 1975 and limited the defenses they could raise?

STATEMENT OF THE CASE⁴

A. Proceeding below

This is a class action to declare unconstitutional and enjoin the enforcement of New York statutes and a regulation⁵ which are alleged to permit children to be removed from foster homes (to return to their parents or to go to other foster homes or adoptive placements) without an adequate prior hearing. Plaintiffs are a New York organization called Organization of Foster Families for Equality and Reform ("O.F.F.E.R.") and three sets of foster parents. The foster parent Plaintiffs were all licensed to board children,⁶ and had foster

⁴ This Statement of the Case is made on behalf of all parties appellant and contains matter relevant to all their appeals. However, the Argument presented relates only to the Appeal of Rodriguez et al.—parents of children in foster care.

⁵ New York Social Services Law (N.Y.S.S.L.) §§383(2) and 400; 18 New York Code Rules and Regulations (N.Y.C.R.R.) 450.10.

⁶ The provisions governing the licensing of foster parents in New York are Social Services Law §§375 through 382; 385-386; and 18 N.Y.C.R.R. Rule 7.5.

children in their homes pursuant to contract between the foster parents and child care agencies authorized by New York State (A. 76a-81a). As foster parents they received a stipend for the care and maintenance of the children from a combination of federal, state and local funds. Custody of the children was with the local Commissioner of Social Services by delegation of the children's natural parents and pursuant to law, N.Y.S.S.L. §383(2). (See A. 63a-67a)

The foster parents commenced this action in the United States District Court for the Southern District of New York on May 9, 1974. They originally sued on their own behalf and on behalf of foster children in their care, and alleged that the statutes and regulation permitting children to be removed from the foster homes denied due process and equal protection of the law to both foster parents and children. The named plaintiffs were granted temporary restraining orders against the removal of the foster children from the foster homes (A. p. 3a #2, #5; p. 4a #16; p. 5a #33).

The original Defendants are various officials of the New York State and local Departments of Social Services responsible for the provision of foster care services in New York. Since no natural parents were named as defendants, four mothers of children in voluntary foster care moved to intervene in the action as Intervenor-Defendants.

On August 19, 1974, Judge Robert Carter allowed the natural parents to intervene, but disallowed the natural parents' cross-claim against the Defendants. On the same date, Judge Carter requested the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284 (A. 39a-41a).

On October 25, 1976, Judge Carter informed the parties informally that he was removing counsel for the foster parents as counsel for the children and

appointing Mrs. Helen Battenwieser to be independent counsel for the children. On November 13, 1975, Mrs. Battenwieser filed an Answer on behalf of the children denying each and every allegation of the foster parents' complaint and alleging that the interests of the children "would be vitally and adversely affected by the granting of the relief prayed for in the Second Amended Complaint." (See A.J.S. Appendices "G", p. 57a and "H", pp. 70a-71a.)

On December 11, 1974, Judge Carter by Decision and Order formally reaffirmed his decision both to appoint separate counsel for the children and to assign Mrs. Helen Battenwieser to serve in that capacity. Judge Carter held that there was an inherent conflict of interest between the foster parents and the foster children. Based upon the pleadings and affidavits filed by the foster parents' attorney, Judge Carter held that this attorney could not adequately represent the children (A.J.S. Appendix "G", pp. 57a, 58a and 62a).

The foster parents filed a Notice of Appeal from this Order to the United States Court of Appeals for the Second Circuit, but then withdrew it without prejudice on or about February 5, 1975⁷ (A. 6a #62, 7a #74). Pending the resolution of the Appeal, no further proceedings were permitted by Judge Carter. Judge Carter refused to consider Mrs. Battenwieser's motion to dissolve the previously issued temporary restraining orders preventing the Defendants from moving the children who were named as parties to the action (A. 7a #64).

⁷Foster parents again sought to have Mrs. Battenwieser removed or supplemented by other counsel after the final judgment below was entered; they were unsuccessful in the District Court, the Circuit Court of Appeals for the Second Circuit, and in this Court.

About February 10, 1975, Judge Carter informed the parties that he was ordering the case to trial, and that trial would be limited to one day. At the trial, held on March 3, 1975, the attorneys for the Plaintiffs and for the children presented various witnesses in support of their separate contentions (A. Index ii-iii). Counsel for the parents of children in foster care, however, were not permitted to present their witnesses (A. 305a-307a). At the conclusion of the trial, the Court dissolved the previously issued temporary restraining orders (R-84, p. 192). Depositions of experts and public officials were subsequently taken in lieu of trial testimony.

On March 22, 1976, the Court issued its opinion. The majority opinion of Judge Lumbard, joined by Judge Carter, held that before a foster child can be transferred from his foster home to another foster home or discharged to his natural parents, the child is entitled to a prior hearing (Appendix "2" to this Brief). Judge Pollack dissented on the ground that the Court should not have decided whether foster children were entitled to a hearing, when their own lawyer opposed this relief as harmful to them. The dissent further argued that due process in the context of the foster care system does not require hearings, as mandated by the majority opinion (A.J.S., Appendix "B").⁸

On the same date, Judge Carter by Opinion and Order certified a class of foster parents in whose homes foster children had resided for more than one year, a class of children who have lived in a particular foster home for more than one year, and a class of all natural parents with children voluntarily placed in foster care for approximately one year (A.J.S., Appendix "E").

⁸ The majority opinion was amended on March 29, 1975; the dissent on March 25, 1975.

The Judgment and Order of the three-judge Court, including denials of motion to reargue which had been made, was filed on April 14, 1976 (A.J.S., Appendix "C").

B. State court proceedings

Several State court proceedings are part of the procedural history of this case:

1. In August 1974, Mrs. Patricia Wallace, who was not a party to this action, but whose four children were named as parties, initiated a habeas corpus proceeding in the Supreme Court of the State of New York for Nassau County for the return of her four children to her. The Nassau County Commissioner of Social Services and the foster parents, Dorothy and Walter Lhotan, were named as Respondents. A law guardian for the children was assigned by the State Supreme Court. After trial in March 1975, and an additional rehearing in October 1975, the trial judge ordered the return of all the Wallace children to their mother—two children to be returned immediately and two at a later date. The Trial Court's decision was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department in February 1976. On April 9, 1976, the New York Court of Appeals dismissed the appeal filed by the foster parents and denied their motion for leave to appeal, 51 App. Div. 2d 252 (2d Dept. 1976), appeal dismissed, motion for leave to appeal denied, 39 N.Y. 2d 705 (1976).⁹

2. In October 1974 Appellant Naomi Rodriguez instituted a custody proceeding in the Family Court of

⁹ The State Trial Court decisions were not reported, but are reproduced in Appendix "9" to this Brief.

the State of New York for the return of her child Edwin to her, pursuant to Family Court Act §651; Respondents were the Commissioner of Social Services of the City of New York and Harlem Dowling Children's Services. In June 1975 Mrs. Rodriguez' petition for custody was denied by the Family Court. In June 1976 the Appellate Division of the Supreme Court of the State of New York reversed the judgment of the Family Court and directed that plans for Edwin's return to his mother be implemented forthwith. That decision is reported at ____ A.D. 2d ____, 383 N.Y.S. 2d 883 (1976).

3. At the time this action was commenced, all the foster parents named in this action were parties to separate foster care review proceedings pursuant to Social Services Law (S.S.L.) §392 pending in the Family Court of the State of New York for New York County and Nassau County, with respect to the foster children in their care—the children named as parties to this action. The cases of Plaintiffs Madeline Smith and Ralph and Christiane Goldberg were actually on the calendar for hearings in the Family Court, New York County, in April 1974 (R-48 Gans Afdvt.). Apparently the proceedings continued, but it is not clear what happened in the interim. In the case of Plaintiff Smith and the Gandy children, after hearings an Order was made in November 1976 leaving the children in Mrs. Smith's care, but not permitting her to proceed to free the children for adoption. This Order is annexed as Appendix "11" to this Brief.

Mr. and Mrs. Lhotan participated in a S.S.L. §392 foster care review concerning all the Wallace children in 1972, after which the Family Court had continuing jurisdiction of the matter pursuant to S.S.L. §392(10).

FACTS OF THE CASE

The Parties

(a) Foster Parents-Plaintiffs

Mrs. Madeline Smith

Mrs. Madeline Smith is a foster parent under the supervision of the Catholic Guardian Society of New York. She and the agency entered into an agreement which included the provision that "the child shall be returned to the agency upon request, realizing that such request will only be made for good reason" (A. p. 79a). The agency, as agent of the Commissioner of Social Services of the City of New York, placed the children Eric and Danielle Gandy with her for foster care in February 1970. They have remained in Mrs. Smith's home continuously since then. The children have had no contact with their mother; they were alleged to be but are not, in fact, legally free for adoption, (A. p. 21a).

In January 1974 a visit to Mrs. Smith by her social worker revealed that Mrs. Smith had developed extreme difficulty in walking. As a result, the agency became concerned that Mrs. Smith's physical condition unduly limited the children's activities, placed excessive responsibilities on them, and prevented Mrs. Smith from being able to protect the children in case of fire or other danger. She was asked to submit a medical report on her condition to the agency. Mrs. Smith was examined by her own physician and informed her case worker that she was forwarding his report to the agency. The last sentence of this report, which was received by the agency, was obliterated; the obliterated sentence was determined to be the following: "The patient in my opinion is totally disabled." Following a

meeting between the case worker and Mrs. Smith concerning the doctor's report, Mrs. Smith was told that she would be receiving a removal notice regarding the foster children, pursuant to 18 N.Y.C.R.R. 450.10.

On March 19, 1974, the Catholic Guardian Society caseworker consulted with the Bureau of Child Welfare of the New York City Department of Social Services. The Bureau advised, on the assumption that Mrs. Smith wanted a pre-removal conference pursuant to 450.10, that such conference would not be held until after the foster care review hearing which, pursuant to S.S.L. §392, was scheduled to be heard in the Family Court of the State of New York for New York County on April 24, 1974. On March 29, 1974, the Catholic Guardian Society formally notified Mrs. Smith of its decision to move the Gandy children out of her foster home by delivering to her the 10-day notice of removal required by 18 N.Y.C.R.R. 450.10 (A. 7a #42, Affidavit of Bracha Graber).

Mrs. Smith indicated on this notice that she was waiving the 10-day notice and did not request that the conference offered in the notice be scheduled (A. 37a).

On April 24, 1974, the parties to the foster care review, including Mrs. Smith, appeared in Family Court. It is not clear what transpired at that hearing, except that the Court directed that the children remain in foster care, and that Mrs. Smith asked for and was given an adjournment, so that she could secure a lawyer. Mrs. Smith had secured Ms. Lowry as counsel by May 3, 1974 (A. 3a #2, R-50, pp. 25-26). The pendency of the 392 proceeding was not disclosed to the District Court when this action was commenced on May 9, 1974, and a temporary restraining order against the removal of the Gandy children was secured (A. 3a #2). However, Mrs. Smith continued to participate in the proceeding. (See A.A. "11".)

Ralph and Christiane Goldberg:

Ralph and Christiane Goldberg are foster parents supervised directly by the Bureau of Child Welfare (Special Services for Children). They and the agency entered into an agreement which stated in part:

"4. The Department of Social Services has the responsibility for planning for the child, including decisions for his removal from the foster home, either to his own family or placement elsewhere.

"5. We agree to cooperate and comply with all plans of the Department of Social Services for the transfer or discharge of a child from our home." (See A. 76a-78a)

The agency placed the child, Rafael Serrano, for foster care with the Goldbergs in July 1969; at that time, he was six years old. Rafael was not free for adoption. The Second Amended Complaint alleged that his parents had signed a voluntary placement agreement under threat of a child abuse proceeding. (A. 19a)

When this action was commenced in May 1974, no decision to move Rafael out of the Goldbergs' home had been made (A. 297a-299a), and no written notice of removal pursuant to 18 N.Y.C.R.R. 450.10 had been received by the Goldbergs (A. 296a). Rafael had not seen his parents in over a year (A. 26a). The Goldbergs were aware that the agency was trying to make a permanent place for Rafael; they were undecided as to whether or not they wanted to adopt Rafael, if that were legally possible (A. 298a-299a). The agency had tried to arrange visits between Rafael and an aunt of his (A. 27a).

While the Second Amended Complaint alleged that Rafael was about to be removed from the Goldberg home to that of his aunt (A. 26a-27a), it made no reference to a pending foster care review §392

proceeding concerning Rafael. At the trial in the District Court, however, Mrs. Goldberg testified that the only specific occasion which the witness could recall when possible removal of the foster child was discussed was at a hearing at a foster care review proceeding held pursuant to S.S.L. §392 in the New York Family Court in April 1974, of which she had had notice, at which she had been present, and where she had an opportunity to be heard (A. 298a-299a).

Walter and Dorothy Lhotan

Walter and Dorothy Lhotan were foster parents under the supervision of the Nassau County Department of Social Services Children's Bureau. The foster parent agreement which they signed with the Children's Bureau is substantially the same as those signed by Plaintiffs Smith and Goldberg (R-105).

The two older Wallace children, Cheryl and Patricia, were placed in the Lhotan home for foster care in September 1970; the two younger Wallace children, Cynthia and Cathleen, were transferred from another foster home to the Lhotan foster home in September 1972. Mrs. Lhotan testified that during this time the children's mother, Mrs. Wallace, rarely visited the children (A. 303a). Mrs. Lhotan testified that on June 26, 1974, she was informed that the agency had decided to return the two younger girls to their mother and transfer the two older girls to another foster home. According to Mrs. Lhotan, the only reason given them for the agency's decision was that the Wallace children loved the Lhotans too much (R-84, pp. 159-160).

On June 28, 1974, the Lhotans received formal notice pursuant to 450.10 that the children would be moved; they requested a conference, which was scheduled for July 9, 1974 (A. 4a, #16, affdvt.). On July 8, 1974, the Lhotans moved to join this action (A.

4a #16), and the conference never took place. Mrs. Lhotan testified that in 1972 she had been party to a S.S.L. §392 foster care review proceeding in Family Court which concerned all the Wallace children (A. 304a).

The decisions of the Appellate Division, as well as of the State Supreme Court in the custody proceeding brought by Mrs. Wallace for the return of her children to her, illuminate the manner in which the Nassau County Department of Social Services Children's Bureau reached its decision to move the Wallace girls out of the Lhotan's foster home.

According to the Appellate Division, an agency social worker made numerous visits to the Lhotan home between August 1973 and May 1974, and on the basis of these visits the social worker became convinced that Mrs. Lhotan

"... does not cooperate with the agency, that the girls are being psychologically harmed, that the social worker's efforts to better the children's relations with their mother have caused a shift from subtle to overt hostility on the part of Mrs. Lhotan and that the children now refuse to speak to the social worker. The social worker concluded that, consciously or unconsciously, Mrs. Lhotan had frustrated all efforts to improve the relationship between the children and their mother." (51 A.D. 2d at 255)

On May 22, 1974, the agency referred the matter for psychiatric consultation. Two psychiatrists, a psychiatric social worker and a psychologist conducted the evaluation and recommended that the younger girls, Cynthia and Cathleen, be returned to their mother; with respect to the older girls, Cheryl and Patricia, the team recommended that they be transferred to another foster home prior to return to their mother.

Both the Appellate Division and the Trial Court noted that the Lhotans had never expressed a desire to adopt the Wallace girls (if that were possible), nor did they affirmatively seek their custody, *State ex rel Wallace v. Lhotan*, 51 A.D. 2d at 257 (1976) (Appendix "9" to this Brief). The Appellate Division agreed with the findings of the New York Trial Court that "the strongly expressed aversions of the children toward their mother are explained by the controlling influence of the Lhotans and the children's fear of being reared apart," 51 A.D. 2d at 257 (1976).

(b) O.F.F.E.R. Plaintiff

The Organization of Foster Families for Equality and Reform is another party Plaintiff. The Second Amended Complaint alleged that "O.F.F.E.R. was organized to provide forums for foster parents to discuss common problems with respect to their relationship to the public officials and child care agency representatives under whose authorization they receive foster children and to gather information with regard to foster parents' rights." (A. 18a) The individual Plaintiff foster parents were not alleged to be members of this New York organization.

(c) Foster Children

Eric and Danielle Gandy

At the time of the commencement of this action, Eric was eight years old and alleged to be retarded; Danielle was six years old. Both had allegedly been placed in the custody of the Commissioner of Social Services by their mother—six years earlier in 1968 (A.

18a). They were placed for foster care in Mrs. Smith's home in 1970 and resided there for four years. They were alleged to be but were in fact not legally free for adoption and had had no contact with their mother since at least 1970 (A. 18a, 21a; A.A. "11"). Because of Mrs. Smith's severe arthritis and virtual inability to walk, Danielle walked to school alone across main thoroughfares, and Eric did all the household shopping. Pursuant to S.S.L. §392, a foster care review proceeding concerning these children was scheduled to be heard in Family Court in New York County in April, 1974. This proceeding, in which the children were separately represented by counsel, eventually resulted in the Order of November 1976 (A.A. "11" of this Brief). The Order makes clear that the children will remain with Mrs. Smith, under continued supervision of the agency.

Rafael Serrano

Rafael Serrano was 11 years old when this action was commenced. He had been placed in foster care by his parents six years earlier, allegedly under the threat of child abuse proceedings. After stays in a number of other foster homes, Rafael was placed for foster care with Ralph and Christiane Goldberg, and by May 1974 had been there for five years (A. 26a). When Rafael arrived in the Goldberg's home in 1969, he was an extremely disturbed child; his condition has greatly improved in the interim (A. 25a-26a). According to the Second Amended Complaint, in 1974 Rafael had not seen his parents in well over a year (A. 26a). A foster care review proceeding was scheduled to be heard concerning Rafael in April 1974. This was the same proceeding to which Plaintiffs Goldberg were parties.

Cheryl, Patricia, Cynthia and Cathleen Wallace

Cheryl and Patricia were almost 12 and 11 years old, respectively, when they joined this action; their two younger sisters, Cynthia and Cathleen, were almost 8 and 9 years old at that time. The Wallace girls were four of the six children of Patricia Wallace; they have two younger brothers, John and William. Their mother voluntarily placed these children in foster care in September 1970. "At the time she was unable to care for them and had severe emotional problems consistent with post partum depression." *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 253. Initially, Cheryl and Patricia were placed immediately with the Lhotans, Cynthia and Cathleen were placed with a Mr. and Mrs. Dunne, and John and William were placed with the Hanson family. In September 1972 Cathleen and Cynthia were also placed in the Lhotan home, while in December 1972 the two boys were returned to their mother. At the time the Wallace girls joined this action, they had been in foster care for four years. The girls had had virtually no recent contact with their mother, and their expressed attitudes toward her were hostile and rejecting. They wanted to remain with the Lhotans. *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 254, 255.

The oldest girl, Cheryl, graphically portrayed her mother as neglectful and uncaring (A. 4a #16, Affidavit and Exhibit). This portrayal was, however, rejected by the Nassau County Supreme Court:

"It is the Court's determination that, aside from an isolated incident of September, 1970, concerning which the testimony is in dispute, there is no credible evidence upon which the Court could base a finding that Mrs. Wallace neglected her children. Nor is there such credible evidence that Mrs. Wallace maintained a course of conduct of entertaining boy friends in the home, or of leaving the children unattended." (A.A. "9")

The girls' hostility toward their mother carried over to their agency worker, Mrs. Clingan, to the point at which "the children now refuse to speak to the social worker," *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 255. However, at the trial in this action, Cheryl testified that she had not been, but wanted to be, consulted about the agency decision that she should leave the Lhotan home (A. 305a).

(d) Intervenor-Appellants—Parents

Mrs. Naomi Rodriguez

Naomi Rodriguez is one of the mothers of children voluntarily placed in foster care who moved to and were permitted to intervene in this action as Defendants. A young blind mother, she voluntarily placed her newborn son, Edwin, in foster care in March 1973. She placed her child because of marital difficulties—her husband had struck her on many occasions. Although she was caring for an older child at home, she was fearful for the infant's safety under these circumstances. Foster care placement had been suggested to Mrs. Rodriguez as a temporary solution by a hospital social worker (A. 69a). The Voluntary Placement form signed by Mrs. Rodriguez and her husband (A. 63a-64a) contains no reference to foster parents, does not specify the duration of the foster care placement (or its limits), and, except for warning as to the consequences of abandonment, does not discuss any procedures or conditions for the return of the child to his parents. In addition to signing the Placement form, Mrs. Rodriguez believed the verbal assurances of the worker from the Bureau of Child Welfare that placement was for a period of up to six months (A. 69a), and that she could have her child returned to her when she so requested.

The Commissioner of Social Services placed Edwin in a foster home under agency supervision. In May 1973, three months after she signed the Placement form, Mrs. Rodriguez separated from her husband and went to live with her mother. At this point she asked the agency to return the child to her. The agency neither returned the child nor told Mrs. Rodriguez what they planned to do. For months, Mrs. Rodriguez telephoned and made personal trips to the agency without receiving an answer. Finally, in January 1974 the agency worker told her orally that she needed additional mobility training to cope with her blindness, as well as a larger apartment. Mrs. Rodriguez was not advised that she could seek the return of her child in a court proceeding, nor was the agency obliged to seek a court order supporting its refusal to return the children. Finally, in April 1974 a member of her family suggested that she consult a lawyer; at this point Edwin had already been in a foster home for "a year or more". Mrs. Rodriguez visited Edwin whenever she was permitted to do so by the agency—once or twice a month (A. 70a). In August 1974 she became a party to this action (A. 39a-41a). In October 1974 she initiated a custody proceeding in the Family Court Act (F.C.A.) §651. The trial was not concluded until June 5, 1975, when her petition was denied. Following appeal to the Appellate Division of the Supreme Court of the State of New York, in June 1976, the Family Court decision was reversed. Edwin was ordered returned to Mrs. Rodriguez three years and three months after she had placed him in foster care, and approximately three years after she first sought his return, *Matter of Proceeding for Custody: Rodriguez v. Dumpson*, ____ A.D. 2d ____ (1st Dept. 1976) 383 N.Y.S. 2d 883.

Ms. Mary Robins

Mary Robins placed her two children, Corrie Lee and William, in foster care while in the hospital. She had been hospitalized suddenly for an undiagnosed illness (A. 6a #43). The placement form signed by Ms. Robins did not place a limit on the duration of foster care placement and made no mention at all of foster parents. The form also stated, "I understand that when the reason for placement no longer exists, I should ask for the child's return and that the Commissioner will return the child, provided that the Commissioner is satisfied that I am able to care for the child." (A. 65a)

When Ms. Robins moved to join this action, her children had not been returned to her despite her requests. Ms. Robins visited the children regularly; meanwhile, they were in a foster home (R-43).

Lillian Collazo

Lillian Collazo placed her newborn child, James, in foster care in January 1974. She had been wrongly denied public assistance and had no apartment to which she could bring the child. She signed the same placement form as was signed by Appellant Robins (R-42, Annexed as Exhibit). She visited her child regularly to the full extent permitted by the agency, but in October 1974, when she moved to join this action, her child was still in foster home care (R-43, Affidavit of Lillian Collazo).

Dorothy Nelson Shabazz

Appellant Dorothy Nelson Shabazz placed her five children, Ronald, Amarah, Albayan, Jamilah and Maryam, ranging in age from three months to six years, in foster care in May 1974. She had been wrongly accused of neglecting them. After she secured counsel, a neglect proceeding pursuant to Article 10 F.C.A. was

instituted against her: the proceeding was dismissed by the Family Court of Bronx County, and the children were returned to her. The order of dismissal is annexed as A.A. "10".

New York Proceedings and Procedures for Placement of Children

In the State of New York, children may be placed in foster care *coercively* as a result of a Court order determining that a child is abused, neglected, in need of supervision, or delinquent (N.Y.F.C.A., Article 10 and 7) or *voluntarily* by consent of the child's parent (formerly N.Y.S.S.L. 384(2), now S.S.L. 384-a).¹⁰ The two types of placement, *coercive* and *voluntary*, are governed by entirely separate and distinct statutes and procedures in the New York State statutory scheme.

Coercive placement occurs in the context of Article 10 of the New York Family Court Act¹¹ which provides for a full judicial proceeding wherein children may be adjudged "abused" or "neglected" and ordered removed from the home of their parents in accordance with a statutory definition (F.C.A. §1012). The provision of due process of law to parents and children is an expressed goal of Article 10 proceedings. (F.C.A. §1011). There is provision for notice of charges and a

¹⁰Neither form of placement results in adoption or availability of a child for adoption. Adoption can only occur after termination of parental rights or surrender, "Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." New York Domestic Relations Law §110. Only adoption creates a new parent-child relationship.

¹¹Hereafter F.C.A.

judicial fact finding (F.C.A. §§1031, 1035, 1036, 1041, 1044). Parents and children have the right to be represented by counsel, F.C.A. §§249, 262, *Matter of Ella B.*, 30 N.Y. 2d 352, 334 N.Y.S. 2d 133 (1972). In cases of imminent danger to the life and health of a child, Article 10 provides authority for emergency removal of a child from the home pending a determination of whether a child is abused or neglected (F.C.A. §§1024-1029). If, after hearing, a child is found to be abused or neglected, a dispositional hearing is provided (F.C.A. §§1045), at which the Court may determine that the child should remain at home, with or without supervision, or be placed in the custody of a relative or with the Commissioner of Social Services, F.C.A. §§1055(b)(i). A placement with the Commissioner of Social Services may be made from up to 18 months; if, at the end of the 18-month period, the child is still in the Commissioner's custody, a formal judicial extension of placement hearing is held, F.C.A. §1055(b)(ii). If a child has been in a foster home during placement, the foster parents are given notice of and may participate in the extension of placement proceedings after the 18-month period, F.C.A. §1055(b)(iii). At this hearing, the Family Court may decline to extend the placement and discharge the child to his parents, may require that further efforts be made to assist in the rehabilitation of the family, or direct that legal proceedings be commenced to terminate parental rights and make the child available for adoption, F.C.A. §1055(b), S.S.L. 384-b, F.C.A. §611.

The statutory scheme for *voluntary* foster care¹² placement is entirely different.

Pursuant to state and federal requirements, S.S.L. §§395, 397(1), 398(1), Title XX Social Security Act

¹²Children may also be voluntarily surrendered for adoption, S.S.L. §384(1)(2).

42 U.S.C.A. 1397(3), New York State, through its Department of Social Services and local Commissioners of Social Services¹³ offers foster care as a service to families of "destitute" children.¹⁴

Children are placed in voluntary foster care primarily in cases of parents' emotional breakdown, as in the case of the Wallace children's mother; parent's physical illness as in the case of Appellant Mary Robins; and family conflict, as in the case of Appellant Rodriguez. Voluntary foster care is also a vehicle for securing special education and treatment for disturbed children.¹⁵

Voluntary placement of a child occurs simply by the parent's signing of a placement form. In contrast to proceedings pursuant to Family Court Act Article 10,

¹³The State is divided into local Social Services districts by county, except for New York City, where five counties constitute one district.

¹⁴S.S.L. §371.3 defines a destitute child as a child who, through no neglect on the part of its parent, guardian or custodian, is:

- (a) destitute or homeless, or
- (b) in a state of want or suffering due to lack of sufficient food, clothing, or shelter, or medical or hospital care.

This category overlaps with defective and handicapped children (S.S.L. §§371.8, 371.9, 398.4) and children born out of wedlock (S.S.L. §398.5).

¹⁵(A. Jenkins, pp. 99a-101a.) Children who are adjudicated abused or neglected enter foster care not by voluntary placement but rather by order of the Family Court in Article 10 proceedings. 20% of the children in Professor Fanshel's and Professor Jenkins' longitudinal study were placed through the Family Court, A. Fanshel, p. 73. This roughly matched the proportion of neglected to dependent children reported on by Robert Catalano, A. pp. 117a-119a.

no Court or attorney is involved in this placement,¹⁶ but only the parent and a caseworker from the local Department of Social Services. The signing may take place at home, in the caseworker's office, or in a hospital. The form may be signed prior to the actual placement of the child, but is frequently signed afterwards, since many placements are unplanned and occur in emergencies.¹⁷ Once a child is placed, the local Commissioner of Social Services has custody of the child who is not classified as dependent, Social Services Law §§383(2), 371. The Commissioner provides foster care for the child directly or through an authorized agency, S.S.L. §§398.6(g), 371.10. The agency in turn licenses and contracts with foster parents for the care of individual children, S.S.L. §§375-382, 18 N.Y.C.R.R. 7.5.

The Commissioner of Social Services has always had power to consent to the return of a voluntarily placed child to his or her parents, S.S.L. §383(1). Prior to the enactment of §384-a, if a local Commissioner refused to consent to the child's return, the parent's only remedy was to institute a habeas corpus proceeding, N.Y.C.P.L.R. Article 70; F.C.A. §651. If the parent

¹⁶Effective August 24, 1976, S.S.L. §384-a2(c)(v) for the first time requires that the placement form advise the parent of a right to consult an attorney (A.A. "3").

¹⁷(R-139 Jenkins, p. 22; A. pp. 69a, 73a.) Although in theory the content of the placement form is negotiable, Cf. S.S.L. §§384(2), 384-a in actuality the local Social Services districts used a standard placement form. Social Services Law §384(2), the governing statute when this action was commenced, did not prescribe the content of the form. At that time, parents who had children in foster homes for one year had signed forms such as that executed by Appellant Naomi Rodriguez (A. pp. 63a-64a).

failed to initiate such a proceeding, the child would remain in foster care.¹⁸

This procedure was superseded by the enactment of Social Services Law §384-a in 1975. S.S.L. §384-a permits specific terms for the return of a child to be stated in the placement form. When those terms are met, or when no terms are specified, and the parent requests the return of the child, the child must be returned unless, within 10 days of the request the local Commissioner having custody of the child secures a Court order prohibiting the child's return.¹⁹

In its present form, S.S.L. §392 mandates authorized agencies to submit to judicial review in Family Court the case of every child in voluntary foster care (or legally free for adoption), who has been in foster care for 18 months. (Prior to 1975, the time for the initial

¹⁸Many parents however had no knowledge of this legal remedy. Appellant Naomi Rodriguez, for instance, did not become aware that a remedy existed for approximately ten months. See Weiss and Chase, *The Case for Repeal of Section 383 of the New York Social Services Law*, 4 Columbia Human Rights Law Review, 326 (1972).

¹⁹The Court order may be secured in a child neglect proceeding (F.C.A. Article 10), in a proceeding to terminate parental rights (S.S.L. §384-b), in a foster care review proceeding. Additionally the agency may rely on a prior Court order denying a parent's custody petition. (F.C.A. Article 6). The procedure to be followed by parents and agency when parents request the return of their child to them must now be set forth in the placement form. A placement pursuant to S.S.L. §384-a is not a "remand or commitment" under S.S.L. §383(1); similarly approval of the placement pursuant to S.S.L. 358-a is not a "remand or commitment." S.S.L. §358-a was enacted in 1973 as a way of qualifying voluntary placements for federal aid pursuant to 42 U.S.C.A. 608-a. This is a "rubber stamping" procedure of which parents waive notice when they sign the placement form. *Children of the State I Preliminary Report of the Temporary State Commission on Child Welfare*, New York, New York 1975, p. 33.

review was 24 months). The child's parents, the foster parents and agency or agencies are parties to the proceeding. Foster parents may initiate the proceeding, and, may press for termination of parental rights. Indigent parents and foster parents have a right to assigned counsel F.C.A. §262. The child may, and usually has, a law guardian assigned in contested proceedings (F.C.A. §249). The Court, after hearing, may order that the child return home, that the child continue in foster care, or that proceedings be initiated to terminate parental rights, pursuant to 384-b, F.C.A. §611, so that the child can be placed for adoption; a child already available for adoption may be ordered placed in an adoptive home.²⁰ There must be another judicial review 24 months after the first one. However, following the first foster care review, the Family Court has continuing jurisdiction to monitor its disposition of the case, and may hold hearings at any time on its own motion or on the application of any party to the proceeding at any time before the next 24 month period arrives, S.S.L. §392(10).

Rights for foster parents have been recognized, not only through S.S.L. §392 but through the creation for foster parents of an adoption priority and a right of intervention in custody proceedings, S.S.L. §383(3), after a child has lived in a foster home for two years. However, the legislature has not limited the length of time a child may remain in foster care and be returned home with the agencies' consent.

²⁰If the order is for the child to continue in foster care, various orders relating to the circumstances under which a child will continue in foster care may be made by the Family Court. For example, provision may be made concerning visitation; the Court may provide that a child remain in a particular foster home (A.A. "11") or may order that services be provided to the parents to strengthen and support the parent-child relationship, S.S.L. 392(9).

Obligations are also imposed upon the parents. Pursuant to S.S.L. §384-b, F.C.A. §611, parental rights may be terminated under a variety of conditions after a child is in foster care. Failure of the parent to visit the child, or to plan for its future, though able to do so, over a one-year period, is a ground for termination of parental rights, S.S.L. §384-b(4)(d). The mental illness or mental retardation of the parents may, under specified circumstances, also result in termination, S.S.L. §384-b(4)(c). Insubstantial visits cannot defeat termination, S.S.L. §384-b(7)(b). However, the initiation of a proceeding to terminate parental rights is left to the discretion of the public child care agencies until the S.S.L. §392 foster care review proceeding is held; then the Family Court may order that such proceedings be instituted.

The Claims of the Parties and Their Disposition Below

Plaintiffs-Appellees in this action are individual foster parents who, for a stipend, pursuant to state license and contract²¹ with a public child care agency, board children in their homes, and an organization of such foster parents. They sued on their own behalf and on behalf of individual foster children, as a class, defining the claims of both as arising after a foster child has resided in a foster home for "a year or more". The foster parents claimed that at the expiration of that time period they acquired a "protected interest" under state law and/or a "liberty" interest under the Fourteenth Amendment of the Constitution, entitling them to continue to care for such foster children.

²¹The provisions governing licensing of foster parents in New York are S.S.L. §§375 through 382, 385-386, and 18 N.Y.C.R.R. 7.5.

On that basis, the foster parents claimed that S.S.L. §§383(2) and 400 and 18 N.Y.C.R.R. 450.10 and the actual practices of the public child care agencies were unconstitutional, because they permitted children to be moved out of foster homes to be either returned home to their parents or transferred to another placement without affording foster parents due process in the form of a prior administrative hearing.

The foster children were also alleged to possess a "liberty" interest in their relationship to the foster parents which similarly entitled the children to notice and a hearing before they could be removed from a foster home in which they had resided for "a year or more".²²

The position advanced on behalf of the children in the foster parents' complaint was subsequently reversed by their independent Court-appointed counsel. Specifically, she opposed the requested hearing requirement.

Appellants-Intervenors are a class of natural parents of children voluntarily placed in foster care. They contended that although parents do not relinquish their constitutional and state law rights as parents by voluntarily placing their children in foster care, the relief requested by Plaintiffs and granted by the district Court would impair and diminish their familial rights and create barriers to the return of their children to them.

The district Court found that the foster parents had no entitlement under state law to the continued care of particular foster children and declined to reach the question of whether the foster parents had a fundamental "liberty interest" in the continued care of foster children who had been placed with them for "a year or more". However, the district Court determined that

²²A. pp. 28a-36a.

foster children in the designated class did have a right cognizable under the Fourteenth Amendment to a prior "hearing at which all concerned parties may present any relevant information to the administrative decision maker charged with determining the future placement of the child".

In this context, the district Court refused to distinguish between those situations in which a child is being moved back to the home of his or her parents and those in which the move is to another foster home or institution. The Court held that in both situations the mandated hearing would perform a "salutary" information-gathering function. Further, the Court held that, since foster children do not have the capacity to exercise their hearing rights independently, a hearing would be required for *every* child about to be removed from a foster home in which he or she has resided for "a year or more". The Court left undisturbed the aspect of the statutory scheme which provided for a hearing both prior to and subsequent to the child's removal, pursuant to S.S.L. §400 and 18 N.Y.C.R.R. 450.10.

The Court's order adjudged New York Social Services Law §§383(2) and 400 and 18 N.Y.C.R.R. 450.10, as presently applied, to be unconstitutional, and enjoined the Defendant agencies from removing or authorizing the removal of any foster children in the certified class from foster homes in which they have lived continuously for more than one year without notice and hearing, at which the foster parents, the foster child and the biological parents may present any relevant information to the administrative decision maker charged with determining the advisability of such removal. At these hearings, the Defendants were ordered to appoint a disinterested adult to represent the child "whenever the Defendants, in their informed

discretion", determine that the child's age, sophistication and ability to communicate effectively his or her own true feelings warrant an appointment. The Court further stated that hearings need not be held in emergency situations where the health or welfare of the foster child is imminently threatened. The Defendants were ordered to promulgate and publish appropriate and consistent procedures.

Parents, children and New York State and City Defendants have appealed to this Court.²³ Plaintiff foster parents have not appealed.

In the Argument that follows Appellants Rodriguez, et al., parents of children voluntarily placed in foster care, are concerned with securing reversal of so much of the Order and Judgment of the District Court as deprives public child care agencies of the power to consent to the return of children to their parents and deprives the parents of the right to have the children returned to them with the agencies' consent. However, some of the questions presented necessarily involve the merits of the Order and Judgment as a whole.

SUMMARY OF ARGUMENT

POINT I

This class action was commenced with a claim for relief asserted by foster parents on their own behalf and on behalf of children in their care. The District Court, noting conflict of interests between these parties and inadequacy of representation, assigned separate counsel for the children. Counsel for the children aligned the children's claims with Defendants and asserted that the

²³ A.J.S. "D" pp. 39a-41a.

relief originally sought by foster parents for the children was harmful to them. The Court nevertheless granted the relief to the children, while still maintaining that there was conflict between the interests of foster parents and children. In the absence of claimed injury by the children's representative, relief was granted without a case or controversy under Article III §2 of the Constitution. The foster parents lacked standing to assert the children's interests since the Court expressly disqualified them from doing so. The district Court should not have adjudicated with respect to the rights of children under these circumstances.

POINT II

A.

Children who are returning home to their natural parents from foster care are not suffering grievous loss, as the District Court suggested. Grievous loss has been held by this Court to characterize unrelieved deprivation. The Court below identified as possible grievous loss the separation of foster children from the familiar environment of the foster home. This finding was based on two factors: the Court's acceptance of the Plaintiff's controversial psychological parent theory, i.e., that separation from the foster home after a year was likely to be separation from the most important relationship in the child's life, and on an erroneous interpretation of S.S.L. §400(2) and 18 N.Y.C.R.R. 450.10 which the Court feared would subject the child to the possibility of repeated placements. That the Court's interpretation of §400(2) is erroneous is clear, when it is considered in the entire context of New York law. That the Plaintiff's underlying theory is controversial and not

even supportive of Plaintiff's own claim of one year as the turning point in the child's relationship is clear from the testimony in the Court below. Given the ambiguity of the proof, and given the evidence of the continued strength of the parental relationship despite foster care, the District Court's application of the concept of grievous loss to the reunion of parent and child flies in the face of this Court's repeated pronouncements concerning the "fundamental" and "important" family relationship between parent and child. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

B.

1. Parents who voluntarily place their children in foster care do not thereby relinquish constitutional and state law parental rights. Parents voluntarily place their children in foster care assuming that the state is acting in good faith when it promises to return their children. Principles of fundamental fairness which must govern the dealings of the state and its citizens require that the state's undertakings have a binding quality. The condition for such consensual and benign state intervention must be that the state respects the right of both parent and child to family integrity. Otherwise, voluntary foster care would be taking of children by the State in the guise of benevolence. The District Court's requirement of a hearing before a child can return home is in irreconcilable conflict with the underlying premise of voluntary placement. A parent who voluntarily places a child in foster care is presumed fit; the district Court by subjecting parents to hearings before children can return home has presumed them to be unfit.

2-4. The importance of the natural parent-child relationship in our society has long been recognized by this Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The rights of parents and their children in voluntary foster care exist within the framework of the constitutionally protected family unit. Parents have a right to the association and custody of their children. Similarly, children have a right to the association and care of their parents. Concomitantly, persons other than parents have no right to interfere with the parent-child relationship when the parent has not been declared unfit, *Stanley v. Illinois*, 405 U.S. 645. This Court has recognized that children as well as parents have a substantial interest in the family relationship. Children who are returning home to their parents from foster care are returning to the constitutionally protected family unit. The conclusion of the District Court that the State must provide hearings before allowing a child in foster care to return to his parents sharply divorces the interests of the child from that of the family unit at an arbitrary time point of one year, when state legislature has drawn time lines rationally. This separation is not justified by the evidence and is not supported by law.

C.

The District Court's hearing requirement imposes a real and substantial impediment to the reunion of children with their parents. The Court's statement of the contrary is incorrect. It not only ignores the emotional burden imposed by forced participation in litigation but also ignores the lengthy nature of custody proceedings and the inherent indeterminacy of custody decisions. In addition, it ignores the special burdens

which litigation imposes on the typically poor and impoverished natural parent, and thereby the parent-child relationship. It is the District Court which confuses the process by which the decision to return children is made and the standard used for that decision.

D.

Children are not arbitrarily returned to their parents, as the district Court suggests. Child care agencies have extensive information concerning children in their care and their natural and foster parents. An agency decision to return a child home is a slow and deliberate process. There is little risk of carelessness in decision-making, because of the broad New York child protective laws. If anything, agencies tend to err in the direction of keeping children in foster care too long. The district Court's concern was unjustified. There are existing legal procedures available to foster parents to provide prior judicial review of an agency determination to return a child home. Plaintiffs-Appellees could have obtained the relief sought in this Court in the context of the S.S.L. §392 proceedings which were pending as to all of them at the time this action was commenced.

E.

There is no evidence in the records to suggest that the time periods selected by the legislature for recognizing the interests of the foster parents in relation to foster children are irrational or unreasonable. The district Court's holding that prior hearings are required when children have been in foster care for exactly one year or more has no basis.

POINT III

The claims of the children named as parties in the instant action were in foster care for four years or more and had no contact with their parents for a year. Their claims were not typical of the claims of the class certified—all children who had lived in a foster home for one year, regardless of the child's ongoing relationship to his own parents, and the named children could not adequately represent the rest of the class. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). Many members of the class have interests antagonistic to those of the named children. The class is unascertainable.

POINT IV

The Court below erred in failing to permit the natural parents to raise and prove their defense to this action. In permitting them to intervene, the Court recognized the natural parents have an interest in the instant matter. Once they had intervened, they had the right to present evidence as to their interest and to raise and prove any defense they might have had to the action. *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822, (2d Cir. 1963), cert. den. 376 U.S. 944 (1964).

They were not permitted to show that the hearings ordered by the Court below do not protect the children and are severely detrimental to the family. The Court's refusal to hear any evidence from the natural parents was so serious as to amount to a denial of due process of law. *Lindsay v. Normet*, 405 U.S. 56, 66 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970).

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT ADJUDICATED WITH RESPECT TO THE RIGHTS OF CHILDREN SINCE THERE WAS NO CASE OR CONTROVERSY WITH RESPECT TO THOSE RIGHTS AS REQUIRED BY III, §2 OF THE CONSTITUTION AND FOSTER PARENTS WERE DISQUALIFIED FROM ASSERTING THE CHILDREN'S CLAIMS.

This action was originally commenced by O.F.F.E.R. and the individual named foster parents both on their own behalf and that of the foster children in their care and contained identical claims for both sets of parties. In response to a claim of conflict of interest between the foster parents and the children, Helen Bittenwieser, Esq. was appointed as independent counsel for the children by District Court Judge Carter on October 25, 1974.

The Answer filed on behalf of the children by Ms. Bittenwieser denied seriatim each and every allegation of unconstitutionality contained in the Second Amended Complaint, whether advanced with respect to foster parents or children, and alleged in Paragraph 8 that the interests of the children "would be vitally and adversely affected" by the granting of the relief prayed for in that complaint.²⁴

Thus, the court-appointed counsel for the children argued that while the statutes and regulations challenged by the foster parents were not harmful to the

²⁴ Appellants' Joint Appendix to Jurisdictional Statements (hereinafter A.J.S.) Appendix "H", p. 70a.

children, the hearing procedures sought by the foster parents would be.²⁵

At the trial counsel for the children presented witnesses in support of her position.²⁶

Despite Ms. Bittenwieser's insistence that the children were adequately protected by existing procedures, the District Court found those procedures constitutionally insufficient. The District Court thus granted the children relief which they had neither requested nor wanted. As Judge Pollack noted in his dissent, "The Court's opinion anticipates a question of constitutional law in advance of the necessity of deciding it."²⁷ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). There was no case or controversy here in the most literal sense. The children, by their Court-appointed representative, did not seek the relief which was granted to them. They claimed that they were not injured by the state Statutes and Regulation challenged by foster parents. There was no controversy between the children and the several defendants. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court stated that the "case" and "controversy" requirement contained in Article III of the Constitution "limits the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 95. With respect to the rights and interests of children determined by the District Court, not only was there

²⁵She did take the position that if hearing sought by the foster parents were mandated that the children should be represented at the hearings.

²⁶Florence Creech, Director, Louise Wise Children's Services, T48-90; Jane Edwards, Director, Spence Chapin Services to Families and Children, T91-123.

²⁷A.J.S. Appendix "B", p. 27a.

not "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" *Baker v. Carr*, 369 U.S. 186, 204, (1962) cited in *O'Shea v. Littleton*, 414 U.S. 488 at 494 (1974), there was no adverseness at all. As Judge Pollack noted in his dissent, "The position of the children taken by the Court is espoused only by the foster parents who have no standing to assert the children's interest,"²⁸ citing *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953), for expression of the general rule that one person does not have standing to assert the constitutional rights of another. This Court addressed this issue recently in *Singleton v. Wulff*, ____ U.S. ____, 96 S. Ct. 2868 (July 1, 1976). There the Court discussed the rationale for the general rule and also recognition of exceptions to the rule. The Court's opinion makes clear that exceptions are to be considered only when the third person is not a party to the litigation. Here, the children are parties and have been provided with independent counsel; representation of the children's interest has been held to satisfy the requirements of Rule 23(a)(4) of the Federal Rules of Civil Procedure and has been praised by the Court.²⁹ The claims of the children and of the foster parents were severed by the District Court because of potential conflict of interest and because the Court found that, based on the pleadings filed, counsel for the foster parents could not adequately represent the interests of the children.³⁰

²⁸A.J.S. Appendix "B", p. 27a.

²⁹A.J.S. Appendix "E", p. 47a.

³⁰A.J.S. Appendix "G", pp. 62a, 64a.

Under these circumstances the foster parents cannot have standing to assert the children's rights over the opposition of the children's counsel. The Majority's insistence in its opinion on the disparity between the interests of the children and the foster parents only underscores this fact.

The provisions of the Order and Judgment of the District Court highlight the internal inconsistency of the Court's handling of this issue. The majority opinion rests solely on a child's constitutional right to a hearing before being moved. It explicitly rejects the foster parents' argument that they have a protected interest in the child. Yet the Order and Judgment dispenses with the mandated hearing if the foster parent requests that the child be moved elsewhere.³¹ Further, independent representation of the child at the hearing is discretionary and need to be provided only when "the child's age, sophistication and ability effectively to communicate his or her own true feelings warrant such an appointment."³² The anomaly of this result was well articulated by Judge Pollack in his dissent:

The Court's recognition of some interest in the child other than that asserted by their independent representative herein betrays a significant confusion over the question of when a child does and does not require independent representation under the Due Process Clause. Apparently a child requires an independent representative in the hearing required by the Court despite the views of the children's independent representative in the hearing of this action.

In short, allowing foster parents standing here to assert the interest of the child seriously undermines the Court's later finding that the child

³¹ A.J.S. Appendix "C", p. 37a.

³² A.J.S. Appendix "C", p. 37a.

requires representation independent of the foster parents at a due process hearing.³³

The Complaint should have been dismissed.

II.

THE COURT BELOW ERRED IN REQUIRING A HEARING BEFORE CHILDREN ARE RETURNED TO THEIR NATURAL PARENTS.

My mommy's sick so how can she take care of us? When she gets better she's gonna take us and we'll never come back. (p. 50).

It's like a home, but not a real home. (p. 31).

There was the Johnsons and the Hammonds and the Roberts and the Bookers... and the Bookers.... Well, the Johnsons she had a baby, and the Hammonds he didn't like a lot of noise, and I guess the Roberts didn't like me too well, and the Bookers, I guess they couldn't stand it either, so they took me here. (p. 34)³⁴

A. A hearing is not required because children who are returning to their natural parents are not suffering grievous loss.

The District Court held that foster children as "persons" within the meaning of the Fourteenth Amendment have a right to be heard before being "condemned to suffer grievous loss" before going home

³³ A.J.S. Appendix "B", p. 34a.

³⁴ Interviews with foster children quoted in Weinstein, *The Self Image of the Foster Child*, Russell Sage Foundation, New York, 1960.

from foster care, citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring)³⁵

The evaluation as to whether a "grievous loss" affecting the weight of an individual interest has occurred is ordinarily made only after it has been determined that an asserted interest is constitutional in nature. *Goldberg v. Kelly*, 397 U.S. 254, 261-263 (1969); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). However, because the characterization is so extreme, it must be rejected at the outset. "Grievous loss" has no application to the return of children in foster care home to their parents.

The term "grievous loss" has been used by this Court to characterize unrelieved deprivation. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), it was public stigmatization with consequent inability to retain or obtain public employment; in *Goldberg v. Kelly*, 397 U.S. 204 (1970), it was the "brutal need" of the destitute welfare recipient; in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Wolff v. McDonnell*, 418 U.S. 539 (1974), it was return to prison and a longer stay in prison.

In this action, the Court below identified as possible "grievous loss" to foster children returning home to their parents the "separation from a familiar environment" i.e., the foster home. By focusing exclusively on the child's relationship to the foster home and ignoring the child's relationship to his own home, the District Court transformed "that usually glorious occasion when he goes to his own parents . . . a time of rejoicing, that the family is reunited" into a traumatic experience.³⁶

³⁵ A.J.S. p. 10a.

³⁶ A. Fanshel, p. 180a.

The foster parents' argument, that foster children need due process protection when child care agencies agree that the children can return home to their parents, was based on two premises. One was that in a matter of months³⁷ after a child leaves its own home and goes to live in a foster home the child may regard the foster parents as his true "psychological parents", possibly to the exclusion of his or her own parents. Therefore, the foster parents' experts view a child's separation from the foster home when he has lived for a time as a potentially painful and important event. In case of conflict over the child's custody between parents and foster parents the foster parents' experts considered the child's relationship to foster parents as the most important, unless and until the conflict is resolved against the foster parents.³⁸

Secondly, in bringing this action, the foster parents interpreted Social Services Law §383(2) and 400(2) and 18 N.Y.C.R.R. 450.10 as creating such a conflict between themselves and the public child care agencies. Parents of children in foster care intervened in this action on the ground that such a conflict was sought to be created with them by the foster parents in derogation of their recognized familial rights, *Meyer v. Nebraska*, 262 U.S. 390 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

The District Court's finding of "grievous loss" as applied to the return of children from foster care home to their parents was based on two major misconceptions. First, it uncritically accepted the highly

³⁷ A. Goldstein, p. 195a.

³⁸ A. Solnit, pp. 224a, 233a; Goldstein, pp. 194a-195a.

controversial³⁹ view that after one year in a foster home—an entirely arbitrary time figure⁴⁰ separation from the foster home was likely to be separation from the most important relationship in the child's life. Second, the District Court erroneously believed that the interplay of 18 N.Y.C.R.R. §450.10 and Social Services Law §400(2) permitted a child to be returned home to his parents after the §450.10 administrative procedure,

³⁹The foster parents relied on *Beyond the Best Interest of the Child*, by Goldstein, Freud and Solnit. An earlier version of the point of view developed in that book was presented in *Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 (1963). Both have been severely criticized by thoughtful commentators: "Psychological parenthood is an ambiguous concept, the criteria for which are not clearly established and which are... difficult to define clearly." Kadushin, Alfred, *Beyond the Best Interests of the Child: An Essay Review*, 48 Social Services Review No. 4, December, 1974, 508, 512; "the proposal is unworkable... it is simply untrue that the behavioral sciences have as yet developed the expertness to make judgments about children and their parents that the scheme requires. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 Law and Society Review 167 (1969). See also Katkin, Bullington & Levinge, *Above and Beyond the Best Interest of the Child: An Inquiry Into the Relationship Between Social Science and Social Action*, 8 Law and Society Review 669 (1974) and Strauss & Strauss, *Beyond the Best Interest of the Child*, 74 Columbia Law Review 996 (1974).

This Court has taken note of "the uncertainty of diagnosis" and the "tentativeness of professional judgment" in psychiatry, *O'Connor v. Donaldson*, 422 U.S. 563, 584, 45 L.Ed.2d 396, 412, citing Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. Law Review 693 (1974). See also the devastating critique of psychoanalysis by Nagel, *Methodological Issues in Psychoanalytic Theory*, in *Psychoanalysis Scientific Methods and Philosophy*, New York University Press, 1965, page 38. A. Chess, p. 130a.

⁴⁰A. Fanshel, p. 177a; Goldstein, p. 200a.

only to be moved again if a second S.S.L. §400(2) administrative decision reversed the first,⁴¹ and thus subjected the child to harm from repeated replacement. However, as will be shown, the holding of "fair hearings" in cases where children are being returned to their parents is contrary to New York law, including the Constitution of the State of New York.

Eminent scholars in the field of foster care as well as family psychiatry, some of whom testified on behalf of Appellants parents,⁴² have disputed virtually every aspect of the theory on which the foster parents' claims rest.⁴³ The theory is derived from unrepresentative

⁴¹A.J.S. 12a, 13a.

⁴²Parents presented the testimony of Professor David Fanshel, Professor Eugene Weinstein, Professor Shirley Jenkins, Dr. Henry Grunebaum and Dr. Joel Kovel.

⁴³Dr. Henry Grunebaum testified that:

"Goldstein... draws conclusions... on the basis of psycho-analytical theory and psycho-analytical theory is only one of the ways we have of understanding children and their development today; and the evidence from psychoanalytical theory is largely gathered from the study of psychoanalysis.

It ignores the considerations of child psychology, and it ignores the considerations of family research and family therapists. I think it ignores common sense in fact; that there are too many every day examples of children having strong attachments to a father who has gone away to the Army to believe that a child has only one attachment and that one attachment is all-important." (A. Grunebaum, p. 255a.)

"[T]here is no such thing as the psychological parent... there are a variety of significant and central attachments in people's lives, out of which they form an identity... I do not believe the Professor Goldstein, whom I have discussed these matters with, can cite any evidence for his point of view; that it is a matter of personal opinion." (A. Grunebaum, p. 258a.)

clinical experience,⁴⁴ from custody cases involving extreme facts,⁴⁵ relies heavily on studies of a few infants⁴⁶ and studies drawn from "pathological" and "catastrophic" settings.⁴⁷ While advanced as a basis for resolving and minimizing custody disputes, the theory in fact generates and exacerbates conflict over children in a way that is harmful rather than beneficial to them.⁴⁸

⁴⁴A. Fanshel, p. 173a; Goldstein, pp. 192a, 200a; Solnit, pp. 211a-213a.

⁴⁵Strauss & Strauss, *Beyond the Best Interest of the Child*, 74 *Columbia Law Review* 996 (1974) at 1006.

⁴⁶A. Goldstein, pp. 200(a), 207(a).

⁴⁷R-90, Kovel, p. 27.

⁴⁸Thus, Professor Eugene Weinstein testified:

"... situations will be set up ... which will set up barriers for return of the child to its natural parents, and also create a situation in which the foster parents now have an investment in trying to make permanent the relationship, where before they were simply provided a contractual service." (R-91, Weinstein, p. 30.)

"It also is likely to lead to an increase in long-term foster care which is not a good situation for children ... [b]ecause it perpetuates what is essentially an ambiguous situation and one in which there is not protection for another kind of right, that is, a long-term foster placement can be terminated at the will of the foster parents.

This is not the case for natural or easily the case for natural or adoptive parenthood, so that the ordinary protection of adoption and natural parents are not available to a child in long-term foster care. It is an ambiguous situation ... which is apt to have deleterious consequences." (A. Weinstein, pp. 111a-112a.)

See also Strauss & Strauss, *op. cit.*, 74 *Columbia Law Review* 966 at 1007.

1. Children in foster care continue to regard their relationship to their own parents as primary.

The District Court's application of the concept of "grievous loss" to the reunion of children and their parents flies in the face of deeply held and cherished beliefs that the relationship between parents and children is "enduring and important," *Stanley v. Illinois*, 405 U.S. 645 at 652 (1972) and that "the familial relationship between parent and child is fundamental to our civilization," *Mattis v. Schnarr*, 502 F.2d 588 at 594 (8th Cir. 1974); *Spence-Chapin Adoption Service v. Polk*, 29 N.Y. 2d 196 (1971). Empirical studies representative of children in foster care, as well as psychiatric opinion attest to the continued validity of those beliefs as applied to the relationship of the parents and children in foster care whom public child care agencies agree to reunite with one another.

Children in foster care continue to identify with and be strongly attached to their parents for long periods of time. Both Professor Eugene Weinstein, author of *The Self-Image of the Foster Child*, and Professor David Fanshel, each independently studied and interviewed children who had been in foster care and in foster homes for from one to five years.⁴⁹

⁴⁹Weinstein, *The Self-Image of the Foster Child*, Russell Sage Foundation, New York 1960.

Each study included children who were placed in foster care when they were between two and three years old.

Professor Weinstein studied 61 children each of whom had been in foster care for from one to five years; the children interviewed were five years old and up. (A. Weinstein, pp. 107a, 112a.)

Professor Fanshel's sample was 624 children. He interviewed children 5 years and older after two and a half years in foster care as part of the larger study. (A. Fanshel, Table 9, p. 189a.)

Professor Weinstein found that foster children who were visited by their parents even as infrequently as twice a year⁵⁰ continued to be emotionally identified with their parents until they had spend at least half their life time in foster care.⁵¹ Moreover, the best adjusted among the children were those who identified with their parents.⁵² Similarly in Professor Fanshel's study, interviews with children after they had been in foster care for two and a half years showed "in overwhelming good measure that the children had positive emotional attachments to their own parents . . . what came through to me on the basis of reading of all of those interviews was the meaning of one's family to a child."⁵³ Professor Fanshel concluded that "if the child has been visited by his parents,⁵⁴ he's able to maintain his attachment to them and therefore removal

⁵⁰In the study regular visiting was defined as twice a year or more. See Table 2, page 54, Weinstein, *Self-Image of the Foster Child*. R-91 Weinstein, Exhibit A.

⁵¹A. Weinstein, p. 108a.

⁵²A. Weinstein, p. 108a.

⁵³A. Fanshel, pp. 180a-181a.

⁵⁴Mrs. Creech, director of Louise Wise Childrens Services testified that "generally there are regular visits when there is a definite plane toward reuniting the child with the family," and that even where there had been a period of time when there was no contact between parent and child, as where the mother was hospitalized, typically the agency would arrange for a period of visiting before a child was returned home. (A. Creech, p. 286a.)

Mrs. Edwards, Director of Spence-Chapin Services for Children and Families testified that prior to returning a child home "in most situations it would be that the parents have been visiting" (R. 84, p. 118).

Ms. Mary Jane Brennan, Director of the Nassau County Children's Bureau testified that when children are returned to their parents "it would be very unlikely that there would have been no contact." (A. Brennan, p. 137a.)

from the foster home need not be the critical issue, they are a secondary source of parenthood for him."⁵⁵ While a child "may have an instantaneous reaction to the separation from what he's gotten accustomed to"⁵⁶ he also gains from his reunion with his parents and therefore the experience is "better for the child to go through."⁵⁷ Dr. John Bowlby, an international authority on these problems has written:

studies confirm what is already known about children, namely that they are not slates from which the past can be rubbed by a duster or sponge, but human beings who carry their previous experiences with them and whose behavior in the present is profoundly affected by what has gone before. It confirms too the deep emotional significance of the parent-child tie, which though it can be greatly distorted, is not to be got rid of by physical separation. . . .

. . . However good the foster mother or house mother, the child will regard her as more or less a poor makeshift for his own.⁵⁸

Thus the District Court's application of the term "grievous loss" to the experience of children returning

⁵⁵A. Fanshel, p. 175a.

⁵⁶A. Fanshel, p. 175a.

⁵⁷A. Grunebaum, p. 260a. See discussion of aftermath of *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966) *cert denied* 385 U.S. 949, a case decided on the "psychological parent theory" in *Strauss & Strauss, op cit.* 74 Columbia Law Review 996 (1974) at 1006. See also *In re Zwiebel*, 79 Misc. 2d 795 (Family Court Nassau County, 1974), for description of a little boy's speedy and successful adjustment upon returning home after a long period of foster care.

⁵⁸Bowlby, John, *Child Care and the Growth of Love*, Penguin Books, 2nd Ed. pp. 137-138 (1953).

home from foster care after one year was completely insensitive to foster children's positive and tenacious identification with their natural parents.

The decision of the District Court was also based on a highly romanticized version of the life of a child in foster home care. A more realistic view was recently presented by Professor Wald in the *Stanford Law Review*:

It is now the prevailing ethic among child care experts that foster care has been overused.... [T]here is a substantial body of clinical findings identifying harms associated with foster care.... [C]hildren often view foster home placement as a punishment for something they did wrong. In addition the child [in foster care] may be confronted with three sets of adults [natural parents, foster parents, social worker], all of whom have some stake in caring for him and planning for his future. In the absence of clearly structured role expectations, both power and responsibility may sometimes be shared, sometimes competed for, and sometimes denied by one or more of the three. As a result children placed in foster care homes often experience identity problems, conflicts of loyalty, and anxiety about the future....

The quality of foster parent homes also varies considerably. While some are warm and nurturing, there are also reports of children being physically abused or mistreated by foster parents. Moreover, children in foster care are frequently subjected to multiple placements.⁵⁹

While focusing on agency decisions to move children, when it protected children's foster status, the District

⁵⁹Wald, Michael S., *State Intervention on Behalf of "Neglected" Children*, 28 *Stanford Law Review*, No. 4, p. 623, pp. 644-645 (1976). For the same point see also A. Fanshel, p. 164a.

Court disregarded the fact that many children are moved at the request of foster parents.⁶⁰

The foster parents' own experts did not object to the return of children to their parents after one year of foster care, merely because of the passage of that period of time. Both Professor Goldstein and Dr. Solnit testified that their concern was with cases where there was a legal conflict about returning their child.⁶¹ But New York law never recognized a right of foster parents to precipitate a legal conflict about the return of children to their parents after one year of foster care. That conflict was created by the claims of the foster parents in this action and magnified by the decision of the District Court. With respect to children like those named as parties to the action, all of whom had been in foster care for at least four years, adequate procedures for the assertion of legal claims by foster parents to their custody already existed in New York law.

2. Social Services Law §400(2) does not apply when children are returned home to their parents; therefore, there is no risk of "grievous loss" as a result of its application.

Foster parents also claimed that removing a child from the foster home only to then return him to the same foster home after a post-removal administrative hearing, subjected children to harm from being moved repeatedly. This argument is based on an interpretation of S.S.L. §400(2) unsupported by any settled state

⁶⁰A. Parry, p. 90a; Brennan, p. 133a; R-48, Affidavit of O'Malley.

⁶¹A. Goldstein, pp. 203a-204a; Solnit, pp. 210a-211a.

court interpretation of that statute. Analysis of S.S.L. §400(2) in relation to other state statutes and case law strongly indicates that S.S.L. §400(2) was never intended to apply in cases where children were being returned home to their parents; and that the application of S.S.L. §400(2) to that situation conflicts with state law, including the Constitution of the State of New York.⁶²

S.S.L. §383(2) expressly states that custody of a child placed out or boarded out is only vested in the authorized agency until the child is "discharged," (Appendix "1" to this Brief). Therefore, when an agency returns a child to his parents, it loses custody of the child. Absent a new voluntary placement agreement pursuant to S.S.L. §384-a, or a court order in a neglect proceeding, under Family Court Act, Article 10, the agency cannot regain custody Cf. *Spence-Chapin Adoption Service v. Polk*, 29 N.Y.2d 196, 199 (1971). Thus, any determination in favor of the foster parent in a S.S.L. §400 fair hearing could not be enforced because an agency lacks the power to retrieve a child who was returned home. This conclusion is reinforced by the fact that S.S.L. §400(2) does not provide for the natural parents to be informed of or to participate in the hearings it establishes, but a decision in such a

⁶²Compare *Matter of W.*, 77 Misc.2d 374, 355 N.Y.S.2d 245 (Family Court, New York County, 1974), *Matter of Dionisio R.*, 366 N.Y.S.2d 280 (Family Court, New York County, 1975), *In re Custody of Mack*, 81 Misc.2d 802, 367 N.Y.S.2d 644 (Family Court, Queens County, 1975). Appellants Rodriguez et al. had urged the District Court to abstain if there was any doubt about the inapplicability of §400(2) hearings when children returned home, on the ground that it would substantially modify the constitutional issue [*Harris County Commissioners Court v. Moore*, 420 U.S. 77, 83, 84, 43 L.Ed.2d 32, 39, 40 (1975); *Bellotti v. Baird*, ____ U.S. ____, 49 L.Ed.2d 844, 855 (1976)].

case would then be useless because it would not bind the natural parents.⁶³

Further, if Social Services Law §400(2) applied to returns home, the section would conflict with the voluntary placement statute, Social Services Law §384-a passed after S.S.L. §400(2). Section 384-a requires an agency to return a child within ten days of the parent's request or at the end of the period of time specified in the original agreement of placement; unless, within a 10-day period, the agency obtains a court order directing that the child not be returned, based on the parents' neglect or abandonment. If S.S.L. §400(2) applied to cases of children returning home, it would interfere with the agency's ability to comply with the requirement of Social Services Law §384-a.

Additionally, there would be a conflict with Social Services Law §392(7), passed after S.S.L. §400(2), which provides for periodic foster care review proceedings in the Family Court, in which the Court may order a child returned to his parents. If S.S.L. §400(2) applied, the Department of Social Services could be subject to conflicting orders. The absurd consequence

⁶³The legislative history of S.S.L. §400(2) indicates that the law was passed in response to *In re St. John*, 51 Misc.2d 96, 272 N.Y.S.2d 817 (Fam. Ct. Ulster Co. 1966), *rev'd sub nom.*; *Fitzsimmons v. Liuni*, 26 App. Div.2d 980, 274 N.Y.S.2d 798 (3rd Dept. 1966), a case involving the attempts of a foster parent whose foster child had been moved to another foster home for purposes of adoption to have the child returned. Mr. Peter Mullaney, Assistant Counsel for the State Department of Social Services, testified that in one year, 1974-1975, there were approximately 12 to 20 §400 hearings requested and approximately 7 to 10 were actually held; some of these few apparently involved the children returned home (A. 142a-144a). There is, however, no recorded instance of a child being returned from its parents to foster care as a result of a S.S.L. §400(2) fair hearing.

of such an interpretation were illustrated by testimony of Peter Mullaney an Assistant Counsel to the State Department of Social Services, who testified that some S.S.L. §400(2) fair hearings had been held even where an order determining the child's custody or placement has previously been made in a S.S.L. §392 proceeding in the Family Court, or in a custody proceeding in the Supreme Court. Agreeing that the Commissioner of Social Services lacks the power to reverse a decision of a Judge of the New York Supreme Court or Family Court, he conceded that in those situations too, there was no authority for "a bona fide remedy for foster parents."⁶⁴ This clearly suggests that there is something wrong with the way the State Department of Social Services has interpreted and applied S.S.L. §400(2).

There are other anomalies as well, if S.S.L. §400(2) applies to situations where a child is returned home. For instance, S.S.L. §400(2) would be inconsistent with S.S.L. §383(3) which gives the foster parents the right to intervene in custody proceedings only after they have had a child for two years; S.S.L. §383(3) would be unnecessary if S.S.L. §400(2) applied to all children who are returned home at any time prior to the two years. S.S.L. §383(3) was enacted in response to a ruling by the New York Court of Appeals (*People ex rel Scarpetta v. Spence-Chapin Adoption Services*, 28 N.Y.2d 185, 21 N.Y.S.2d 65 (1971) *cert. denied*, sub. nom. *De Martino v. Scarpetta*, 404 U.S. 805) that foster parents could not intervene in custody proceedings affecting a foster child, as against the child's parents. The Legislature's subsequent creation of this right after two years by the passage of S.S.L. §383(3) suggests that the Legislature believed the foster parents could not contest the natural parents' right to custody

⁶⁴A. Mullaney, p. 145a.

of a child at an earlier time. Cf. *People ex rel Anonymous v. Saratoga County Department of Public Welfare*, 30 A.D.2d 756 (3rd Dept. 1968).

Finally, if S.S.L. §400 applies to situations where children are returned home to their parents, the fair hearing becomes a custody proceeding⁶⁵ to be determined by the State Department of Social Services. But this Department does not have custody jurisdiction. That power is reserved to the Supreme Court and the Family Court by the New York State Constitution (New York State Constitution, Art. VI, §§7, 13(b) amended 1973); *Boone v. Wyman*, 295 F.Supp. 1143 (S.D.N.Y. 1969) *aff'd*, 412 F.2d 857 (2d Cir. 1970), *cert. denied*, 396 U.S. 1024 (1970). In New York, custody jurisdiction, as part of equity jurisdiction, is constitutional rather than merely statutory. See *Aberdeen Restaurant Corp. v. Gottfried*, 158 Misc. 785, 788 285 N.Y.S. 832, 835 (1935). In holding fair hearings pursuant to S.S.L. §400(2), when a child goes home, the State Commissioner of Social Services would be in excess of his power and in violation of the New York State Constitution.

Thus a careful analysis of the New York State statutory scheme makes it clear that until the decision of the District Court, the application of S.S.L. §400(2) never could result in the situation in which a child who was returned home by an agency would subsequently be returned to foster care after a S.S.L. §400(2) fair hearing decision. Therefore, when an agency agrees to return a child to his parents there can be no claim that a child will be harmed by repeated replacement. Consequently the question of whether there would be such harm need not be addressed and the concept of "grievous loss" does not come into play.

⁶⁵The Commissioner would be deciding whether to relinquish custody by discharging the child pursuant to S.S.L. §383(2).

If S.S.L. §400(2) did in fact provide prior hearings to foster parents in each case where a child was returned home to his or her parents from foster care, the result would be a denial of due process of law to parents. That is also the effect of the decision of the District Court.

B. The hearings mandated by the District Court impermissibly infringe on the constitutionally protected family unit.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 409 U.S. 564, 569 (1972); *Matthews v. Eldridge*, 424 U.S. 319, —, 47 L.Ed.2d 18, 31 (1976).

There were three private interests asserted in this action at the District Court level: those of foster parents, parents and children. The District Court did not find any interest asserted by foster parents for themselves to be constitutionally protected and the foster parents have not appealed. Therefore, only the interests of parents and children in their relation to one another and to the state are before the Court.⁶⁶ Before a proper assessment of those interests can be made, it is necessary to consider both the nature of the foster care system as a social arrangement and the nature of foster care placement as a form of state intervention. Cf. *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁶However, plaintiffs will no doubt continue to assert the rights of foster parents even though they have not appealed, just as in the District Court they continue to assert the interests of children though disqualified from doing so.

1. The District Court ignored the nature of foster care placement.

The historical underpinnings of the foster care system can be found in the early practice of indenture of children.⁶⁷ The practice of binding out poor, orphan and illegitimate children was widespread in many states in the 18th Century and had its origins in English practice and law. It was considered to be the most economical kind of social provision for those children.⁶⁸ Poor parents as well as children were, in effect, both treated as chattels, their humanity and their family ties ignored because of their destitute state.

Not all poor children were indentured. Sometimes "outdoor relief" or material aid supplied to destitute parents in their own homes preserved a child's home. But outdoor relief was the less common form of care. Institutions such as almshouses, and later, special institutions for children, such as orphan asylums, were prevalent by the end of the 19th Century.⁶⁹

The use of foster homes also began in the 19th Century.⁷⁰ Because of their closer approximation to the natural family setting, foster homes were thought to represent an improvement over prior systems.

Over the first half of this century, particularly under the impetus of studies which reported on the harmful

⁶⁷Costin, *Child Welfare: Policies and Practice* 323 (1972); Mnookin, *Foster Care—In Whose Best Interest?* 43 *Harvard Educational Review*, 599, 603 (1973).

⁶⁸Jenkins, *Child Welfare as a Class System in Children and Decent People* 7 (A. Schorr ed. Basic Books, New York 1974).

⁶⁹Costin, *Child Welfare: Policies and Practice* 324, 325 (1972); Jenkins, *Child Welfare as a Class System in Children and Decent People* 8 (A. Schorr ed. 1974).

⁷⁰Costin, *Child Welfare: Policies and Practices* 325 (1972).

effects of institutional care on children, foster home care became the predominant mode of substitute care provided by the state away from the child's own home.⁷¹

However, whereas the 19th century model of foster care originally developed by such figures as Charles Loring Brace was, like indenture, based on a complete severance of the child and his family,⁷² in this century there has been a gradual recognition that complete severance of the child from his family is neither possible nor advisable for the child.⁷³ Accordingly, child welfare goals and practices were re-oriented to support the primacy of the family unit, even for families who require help in caring for their children from the state foster care system. This orientation underlies the concept of foster care today.

The distinguishing aspect of foster care is that it is designed to be a temporary arrangement. The family is broken up only so that it can be put together again in a way that will be less problematic for the child.⁷⁴

Both child and parent suffer from the separation from each other.⁷⁵ These personal losses are deemed

⁷¹Jenkins, *Child Welfare as a Class System in Children and Decent People* 8 (A. Schorr, Basic Books ed. 1974); Costin, *Child Welfare: Policies and Practice* 327 (1972).

⁷²Costin, *Child Welfare: Policies and Practice* 325-6 (1972).

⁷³J. Bowlby, *Child Care and the Growth of Love* 13-20 (1965); Wald, *State Intervention on Behalf of "Neglected" Children: Standards of Removal of Children from their homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 *Stan. Law Review* 623, 644 fn. 99 (1976).

⁷⁴Kadushin, *Child Welfare Services* 411 (1967).

⁷⁵Jenkins and Norman, *Filial Deprivation and Foster Care*, Col. U. Press, N. Y. (1972). See also A. Jenkins, 102a-103a.

acceptable in view of the expectation that the family unit will be made whole again when the parent is ready to resume care for the child; reunion of the family requires however that the child be able to leave the foster home.

The role of the foster parent is not to replace the child's own parent, but rather to support the parent-child relationship.⁷⁶ Foster parents have been described as a special kind of people who "allow easy entrance and exit of children from their families." (A. Fanshel 167a). The operation of the foster care system depends on their possessing this quality, and the State must encourage acceptance of this role despite its inherent difficulties.

"[F]oster care is, in itself, an imperfect response to family disaster and social neglect".⁷⁷ It is a social system which brings the most sensitive and vulnerable emotions into play in "a complex network of

⁷⁶Professor David Fanshel described the foster care concept: "... The placement of a child in foster care is a very delicate social arrangement. It's a social mechanism for creating a balance in a situation that has gone askew. A child is in need of care. He's a member of a biological unit; and society intervenes on his behalf to assure him that he get the kind of consistent care that is required. . . . "But that arrangement is based on the notion that a beleaguered parent who is succumbing to whatever forces are operating upon her in preventing her from functioning, can be assured that these services will be rendered on behalf of her children, and will also be assured that her parental rights will be respected. Therefore, the selection of people, and supportive work done by agencies is to help the foster parent understand the distinction between having their own child or having an adopted child and having an interim responsibility for someone else's child." (A. 162a.)

⁷⁷The Children of the State I, The Preliminary Report of the Temporary State Commissioner on Child Welfare, New York, New York 1975, p. 22.

relationships.”⁷⁸ This social system exists within a framework of “state action” cf. *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974). Voluntary foster care as provided by the State of New York occurs only at the request of or with the agreement of the child’s parent, S.S.L. §§395, 398, 384(a). As such it is a *benign* form of state intervention in the parent-child relationship.

Parents have consented to state intervention in the lives of their families on the assumption that the state was acting in good faith when it offered foster care as a help and service to them, and when it promised to return their children when help and services were no longer required. (A. Rodriguez 68a-72a, Jenkins 102a-104a).

Until the decision of the district Court, their reliance was well founded in New York law. Formal placement is with the local Commissioner of social services, who has legal power to return the children pursuant to Social Services Law §383(1), *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196 (1971). Social Services Law Section 384-a, enacted in 1975, makes return of the child mandatory in the absence of a Court order which prohibited such return.

Principles of fundamental fairness which must govern the dealings of the state and its citizens require that the state’s undertaking have a binding quality. In contrast to *coercive* state intervention, as in the case of an adjudication of child neglect (F.C.A. Article 10), in the voluntary placement scheme the

⁷⁸“Foster care is a complex network of relationships. The child, the agency, foster parents, biological parents, and that these relationships are interconnected so that what occurs in one pair in the set has reverberations for other relationships in the network, what occurs between the agency and foster parent which may affect the natural parent, the child.” (A. Weinstein 110a).

state has never had to meet the burden of establishing in a court of law that it had the right and power to intervene beyond the wishes of the parents. The condition for *benign* state intervention therefore must be that the state respect the right of both parents and children to family integrity, subject to the state’s power to protect the child from abuse and neglect, *Stanley v. Illinois*, 405 U.S. 645 (1972).⁷⁹ Otherwise, voluntary foster care placement would simply be a “taking” of children by the State in the guise of benevolence. Such a result would be legally and morally intolerable.

By depriving the state of the power to return a child to his or her parents after one year of foster care placement and by requiring a hearing in each case the decision of the district Court changes the nature of *voluntary* foster placement from *benign* to *coercive* state intervention. This drastically impinges on the contractual and moral basis of the placement retrospectively. Without prior adjudication of abuse, neglect or abandonment the parents as a class must now be treated as unfit and subjected to burdensome legal procedures. Under the reasoning of *Stanley v. Illinois*, 405 U.S. 645 (1975) this is a denial of due process of law.

⁷⁹This principle was recognized by the New York Court of Appeals in *In re Jewish Child Care Association v. Sanders*, 5 N.Y. 2d 222, 183 N.Y.S. 2d 65 (1959) where it explained that while the child care agency has the present legal right to custody of a child temporarily placed in foster care pursuant to S.S.L. §383(2), as against persons other than the child’s parent it stands in a representative capacity as the protector of the parents inchoate custodial right and of the parent-child relationship which is to become complete again when the child is returned home. *Id.* 5 N.Y. 2d at 229, 193 N.Y.S.2d at 70.

2. The decision of the district Court ignores the nature and the rights of the Family as a Unit.

The rights of parents and their children in foster care exist within the framework of the constitutionally protected family unit, as recognized by this Court. In *Stanley v. Illinois*, the Court said "the integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, 405 U.S. 645 at 651 (1972). In *Prince v. Massachusetts*, 321 U.S. 158 at 166, the Court took note of a "private realm of family life which the state cannot enter". In *Griswold v. Connecticut*, Mr. Justice Goldberg wrote that

"the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as fundamental rights specifically protected. 381 U.S. 479, 495 (1965).

The continued significance of the parent child unit, after, as well as before foster care is not simply a legal construct. Family ties persist despite foster care. Mothers of children in foster care feel deprived when they place their children in foster care; when children are returned their mothers feel thankful and relieved.⁸⁰

⁸⁰(A. Jenkins 102a-103a.) Professor Jenkins testimony was based on a study of the parents of the children in foster care studied by Professor Fanshel. Her studies are reported in Jenkins & Norman, *Filial Deprivation and Foster Care*, New York Columbia University Press (1972) and Jenkins, *Beyond Placement: Mothers View Foster Care*, New York, Columbia University Press 1975.

The children whom agencies agree to return to their parents are wanted⁸¹ by their parents. Typically they have continued their relationship through visiting.⁸² The children also continue to identify with their parents. Professor Weinstein offered this explanation for the persistence of family ties:

There are two lines of theoretical argument that would make such findings understandable to us: One is importance in Freudian theory of early attachments and the tendency for these to persist, but there is also another more social psychological as opposed to clinical reason for this—biological parenthood is of value in our society. Children in foster care are quite aware of the fact that they are different and that difference is something that is devalued. Children come to learn that being with one's biological parents is an important aspect of identity, something that they take on as ordinary members of society. I mean it [foster status] is a stigma for them.

They often have a visible sign of the stigma, of the difference between their last name and the last name of the people with whom they live.⁸³

Another witness, the family psychiatrist Dr. Henry Grunebaum of the Harvard Medical School added the further explanation that human need to understand

⁸¹Ms. Jane Edwards, Director of the Spence Chapin agency testified that before the agency agrees to return a child to their mother they look to "how she has demonstrated wanting the child." (A. 292a).

⁸²(A. Creech p. 286a, Brennan p. 137a; R-84 Edwards p. 118).

⁸³(A Weinstein 110a).

oneself as historically and biologically tied to certain people.⁸⁴

However, the value of the natural parent-child relationship in our society does not and should not have to be justified by scientific proof, it has long been recognized by this Court:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 A.L.R. 1446 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and [r]ights," far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, supra, at 399, 67 L.Ed. at 1045, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, supra, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In complete contradiction to those principles, the conclusion

⁸⁴(A. Grunebaum 248a-249a.) "What I object to . . . is the cavalier disregard of the value of one's biological tie. (A. Fanshel p. 181a).

of the district Court that the State must provide hearings before allowing a child in foster care to return to his parents sharply divorces the interest of the child from that of the family unit. This separation was unjustified.

3. The district Court erroneously assumed a conflict of interest between parents and children in all cases.

The Court below did not consider the parents' rights, or the rights of the child as part of a family unit. The Court assumed adversity of interest between the child and his parents. The Court based its holding on this Court's decision in *In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), *Goss v. Lopez*, 419 U.S. 565 (1975) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). But in all four cases there was no asserted conflict between the interests of children and their parents. On the contrary, in *Gault* and *Tinker*, parents were supporting the rights of their children. In *Goldberg*, to the extent it involved mothers whose AFDC benefits had been terminated, the mothers were advocating their children's interests as their own. Similarly, in *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Armstrong v. Manzo*, 380 U.S. 545, the parental interest asserted was not perceived to be in conflict with that of children. As conceptualized by this Court, within the context of the family unit, parents have rights on their own behalf as well as on behalf of their children. The Court identified rights of parents to their relationship with their children as "cognizable and substantial," *Stanley v. Illinois*, 405 U.S. 645, 652; the interest of parents in the welfare of their children was characterized in *Yoder v. Wisconsin*, 406 U.S. 205, 232 (1972). The Court stated

"The history and culture of Western civilization reflect a strong tradition of parental concern for nurture and upbringing of their children. The primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition".

By placing a child in foster care, the parent temporarily unable to care for his or her children, provisionally transfers the power to make many critical decisions affecting the child's upbringing to the local social services official. It should not be that as a result of foster care placement with a particular foster parent for one year the child acquires the "right" to refuse to live with his parents when the public child care agency and his parents jointly determine that he or she could return home.

The district Court's recognition of a child's right not to be separated from a neutral familiar environment, when applied in the context of return home from foster care, in effect bestows on a child a protected interest in being apart from his family.

The creation of such a right conflicts with the traditional view that children have no right to refuse their parent's care, custody and companionship.

The traditional view is that children are incomplete persons who lack the capacity for independent choice and independent action required for the exercise of many of the activities encompassed within the concept of liberty.⁸⁵ Cf. *Goss v. Lopez*, 419 U.S. 565, 590-591 (1975) dissenting opinion, of Justice Powell and *Ginsberg v. New York*, 390 U.S. 629, 63, (1968)

⁸⁵Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion, John Mill, *On Liberty*, 13-14.

concurring opinion of Mr. Justice Stewart. The organization of the family as a social unit in which parents make critical decisions for their children is consistent with this view. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The parent's role is not seen as harmful to children but as necessary and protective.⁸⁶ The ability of parents to determine that their children live with them is an indispensable condition to the concept of the family unit, cf. *Stanley v. Illinois*, 405 U.S. 645 (1972), and a child's independent right to choose not to live with his or her parents would seriously undermine the family's child rearing functions.⁸⁷ Thus while children may have independent interests consistent with the existence of the family unit, *Gault, Tinker and Goss*, or in extraordinary circumstances in conflict with the family unit, *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____, 49 L.Ed.2d 788 (1976), rights of children which destroy the family unit should not be recognized.

The district Court ignored the fact that it was postulating rights of children in derogation to the family unit. Ignoring the importance of the family unit, it attributed rights to children based on a theory of children's best interests which it found compatible. It preferred the risk of keeping children in foster care to the risk of returning them home to their parents. However, there is no consensus among social scientists

⁸⁶Locke, John, the Second Treatise of Government. §61 "and thus we see how natural freedom and subjection to parents may coexist together and are both founded on the same principle."

⁸⁷See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to their "Rights,"* Brigham Young University Law Review, 1976, No. 3, p. 605 at 654-656.

or society at large as to children's best interests or how to attain them. The conflict of expert opinion in this case attests to this fact. As one commentator put it:

"Deciding what is best for a child poses a question no less ultimate than the purpose and values of life itself . . . Society at large [provides] neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values."⁸⁸

This Court's recognition of a constitutional zone of privacy protecting family life with respect to "activities relating to marriage-procreation, contraception-family relationship, and child rearing and education," *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citations omitted) respects this lack of consensus.

In assessing children's interests in this action the District Court was under an obligation to give great weight to the recognized claim of natural parents to custody and control of their children and the correlative concept, implicit in the decisions of this Court and deeply embedded in New York law, that absent extraordinary circumstances a child's best interest is to be in the care of his or her parents. *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 324 N.Y.S.2d 937 (1971); *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976). It is the parent, not the state or the foster parent, who is the child's natural ally and protector.

⁸⁸Mnookin, *Child Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemporary Problems, 226 (1975) at 260-261. See also Wald *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stanford Law Review, April, 1975, p. 985.

4. The District Court did not explain how to identify children's independent rights: If rights must be attributed to children in foster care, then such a child has a right to return home to his family.

The Court below held that children have rights independent of their parents but failed to explain how these rights are to be identified. The wishes of the thousands of children involved in this case cannot be reliably articulated by the children themselves. The Court below certified a class of children, from one year to eighteen years without regard to age differences. Thus, many of the children are too young to state their wishes, and even older children find articulation of subjective emotions difficult:

"To face up to one's real emotions and to probe into one's real motives is not a capacity which we expect to find in children. On the contrary, children of all ages have a natural tendency to deceive themselves about their motivations, to rationalize their actions and to shy back from full awareness of their feelings, especially where conflicts of loyalty come into question."⁸⁹

⁸⁹Freud, *On the Difficulties of Communicating with Children*, in *The Family and the Law*, Goldstein & Katz, eds. (1965). Several of plaintiffs' witnesses testified that they would not expect a child to be able to decide with whom he or she should live, they would take the child's preferences into account. Thus Dr. Stella Chase, one of plaintiffs' witnesses, testified:

- Q. Do you think children are capable of forming judgments about where they want to live?
- A. Some children are and some aren't.
- Q. With regard to a child who is capable of forming, in your opinion, who is capable of forming a judgment as to where they want to live, how important is it to consider the child's opinion in a decision with regard to where the child should live?
- A. I would listen very carefully, but I wouldn't automatically act on it. . . . You have to evaluate the total circumstances and the child cannot be expected to be aware of the totality of the circumstances, so that his reaction is bound to be on the basis of only that segment of experiences that he has been through. (Chess, A., pp. 124a-125a. See also Solnit, A., p. 223a-224a.)

If the district Court found the identification of the interests of foster children with the rights of their parents incompatible, it nevertheless could not simply ignore the profound history and meaning of the parent-child relationship as recognized and interpreted by this Court since *Meyer v. Nebraska*, 262 U.S. 390 (1923), simply because it wished to recognize that children are "persons" under the Fourteenth Amendment. The district Court should have recognized that among the rights to be attributed to the children in this action (if "rights" are to be attributed regardless of capacity) is a child's right to his or her own family to the association, companionship and care of his or her parents, to his unique heritage, to be with his or her own siblings, in sum, to be at home.

That children have a substantial interest in their relationship to their parents has been acknowledged by this Court.

In *Levy v. Louisiana*, 391 U.S. 68, this Court, in assessing illegitimate children's claims to recover for the wrongful death of their mother, referred to the rights of a child "based on the intimate familial relationship between a child and his own mother", *id.* at 71. The Court's recognition that in their mother's death the children "suffered wrong," *id.* at 72, is complementary to the mother's right to recover for the loss of her illegitimate child in *Glonn v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968); cf. *Mattis v. Schnarr*, 502 2d 588 (8th Cir. 1975). In *Gomez v. Perez*, 409 U.S. 535 (1973), the absent father is not caring for his children, yet it is the parent-child relationship which gives the illegitimate child the basis for their claim to support under Texas law. In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court referred to "the natural affinity of children for their father," *id.* at 169, holding that it was as great in

the case of illegitimate as legitimate children. Chief Judge Breitel's statement, for the New York Court of Appeals, that a child in foster care is "not no one's child," *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 199, 324 N.Y.S.2d 937, 939 (1971), rings true in relation to the rights of children as well as of the parents. Thus the traditional analysis that a child's best interest is that it be raised by its parents," *Id.* at 204, 944, can be accommodated into the view that a child has rights not only vicariously through his or her parents but also independent rights of its own, without undermining the principle that "child and parent have a right to be together." *Id.* at 199, 939.

In identifying the nature of the constitutional rights of children in this action, the district Court should have therefore identified the positive right of children in foster care to the companionship and care of their own parents in addition to any possible right of a child not to be separated from a familiar environment.

However, even if the wishes of the child could be satisfactorily articulated, there is no reliable system for determining when the child's right to the companionship and care of his parents is outweighed, by a right, not to be separated from a familiar environment. The variables are too personal and subjective to permit a clear line to be drawn. The question of when the state should cease to support a child's ties to his or her parents and encourage and protect the child's ties to foster parents then becomes a policy, not a constitutional decision. The issues involved are so complex and the conflicting rights so sensitive as to demonstrate that the decision is one of legislative choice.

The New York State Legislature has made its choice by its elaborate statutory scheme which, beginning with foster care review 18 months after placement under S.S.L. §392, increases the obstacles to discharge a child

with increasing time in foster care. The foster parents have not shown the legislative choice to be arbitrary and irrational. The Court below apparently found the foster parents psychological theories compatible with their own; but this was not a proper basis for a constitutional decision. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

C. The prior hearings required by the District Court impede the reunion of children and their parents.

The hearing mandated by the District Court will create a real and substantial impediment to the reunion of children with their parents yet the benefits provided by the hearing are dubious. The District Court's assertion that the mandated hearings will not "impede the right of biological parents to regain custody of their children"⁹⁰ is simply incorrect.

The requirement of an automatic hearing before the discharge of every child in foster care for more than a year creates a powerful incentive and opportunity for foster parents to subvert the child's relationship to his own parents in order to create a basis for victory in a subsequent custody contest.⁹¹ Since there is a shortage of children available for adoption, this is a very real

⁹⁰A.J.S. Appendix "A" p. 11a.

⁹¹*Strauss & Strauss, op cit*, 74 Columbia Law Review 996 (1974) at 1008.

risk.⁹² This incentive is exactly contrary to the foster obligations to respect and support the children's ties to their parents. *State ex rel. Wallace v. Lhotan*, 51 App. Div. 2d 252, 380 N.Y.S.2d 250, 256 (2d Dept., 1976); *Spence-Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 205, 324 N.Y.S.2d 937, 945 (1972).

The power of the foster parents to undermine the child's relationship to his or her own parents is enormous. The foster parent may speak ill of the parent and may fail to cooperate in bringing children to the agency for visits with their parents. When hostility of children to their parents is permitted to grow the parent suffers the consequences,⁹³ but the child does too. Children torn between loyalty to their parents and the need to please foster parents on whom they depend for day to day care are subjected to great and harmful emotional stress.⁹⁴ This was described by Dr. Grunebaum who said:

"It seems to me that to the extent to which foster parents feel that they can obtain custody of children either de facto or de jure . . . it places a potential incentive on the child's foster mother to separate and attenuate the relationship with the child's biological mother which can only be bad

⁹²This is the danger that the foster care system would be undermined and converted into a kind of semi-adoption system as the need for adoptable children, the pressure for adoptable children grows and grows with abortion and contraception decreasing the supply of available children. So that such a practice could become in fact a means for taking children from poor parents and providing some of the relief from pressures for adoptable children, which is not what the foster care system was intended to provide at all." (Weinstein, A 11a).

⁹³*State ex rel. Wallace v. Lhotan*, 51 A.D.2d 252, 380 N.Y.S.2d, 250 (1976).

⁹⁴Creech—The child is a loser no matter what. R-84.

for the child. So that I think that, that can only be harmful. It is very analogous to the issue I spoke of earlier about custody. It is in a child's interest to feel that its biological parents are good people, that its heritage is a worthy one; and to the extent where one feels that his heritage has been denigrated, it seems to me to that extent one would suffer identity problems in later life, feeling that there is a part of oneself that is unworthy of respect.⁹⁵

The standard governing New York custody proceedings between parents and non parents will not protect the parent-child relationship from efforts to undermine it.

The District Court held that reunion of children with their parents would not be impeded by the mandated hearings. It stated that appellants parents were confusing the *process* by which the decision to return children to their parents would be made with the *standard* for decision.⁹⁶

In the circumstances presented by this case, this distinction is specious. It ignores the protracted nature of custody proceedings. It ignores the enormous

⁹⁵A. Grunebaum, p. 253a-254a.

⁹⁶The standard as enunciated by the New York Court of Appeals is as follows:

"Except where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent" *People ex rel Kropp v. Shepsky*, 305 N.Y. 465, 469, cited in *Spence Chapin Adoption Services v. Polk*, 29 N.Y.2d 196, 203 (1971).

emotional burden which forced participation in prolonged litigation will impose on the parent-child relationship. Paradoxically, it ignores the child.⁹⁷

The court speaks of a "speedy and final decision" for the child⁹⁸ yet imposes a hearing requirement which by its nature cannot be speedy and by virtue of other provisions of law may well not be final.⁹⁹ S.S.L. §400(2) hearings are already long. (A. Mullaney, 141a) Fair hearing decisions are appealable to the New York Supreme Court (C.P.L.R. Article 78) and beyond.

The extraordinary delay which results from a contest over a child's return is illustrated by the cases of both the Rodriguez and the Wallace families where litigation lasted almost two years. Delay is the rule not the exception. See *Kessler v. Kessler*, 10 N.Y.2d 445, 459, 460 (1962); *People ex rel Weselt v. New York Foundling Hospital*, 36 A.D.2d 936, 937, 321 N.Y.S.2d 417, 419 (1st Dept. 1971);¹⁰⁰ *Finlay v. Finlay*, 240

⁹⁷What this does to the children—the whetting of bitter emotions between their parents, the pulling and hauling from one temporary solution to another; the insecurity, often the direct appeal to the child to take sides and make choices which he is incapable of making—all this is too painfully obvious to need description. J. Despert, *CHILDREN OF DIVORCE* 189 (1962).

⁹⁸A.J.S. Appendix "A" 16a.

⁹⁹Gellhorn, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* 313 (1954). What is involved essentially [in custody disputes] is a determination of personality and emotional attitudes as they affect relationship between the parents and children... the adversary method is a painfully slow way of developing the mass of factual details out of which such attitudes can be made apparent and it may often fail to produce significant data. *Id.* at 310 (1962).

¹⁰⁰[S]ince [April, 1969] this matter has been in the Courts. Certainly if the child had been returned at the time of the initial request, this entire proceeding could well have been avoided without heartache or undue distress to anyone... The observation that the child has spent most of her young life with the proposed adoptive parents, while accurate, has viability as a supportive argument only because of the interminable delay in those long drawn out proceedings) (dissenting opinion).

N.Y. 429, 434 (1925). Both parent and child will be deprived of each other's companionship in the long interim occasioned by custody litigation. A child who looks forward to returning home may feel hurt and not understand the delay. At the same time delay is particularly harmful because the passage of time itself tends to shift the equities against the natural parents. See *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976).

Further shifting the equities against the natural parent is the nature of the standard itself.

Even given the primacy of parental rights the standard for decision in custody proceedings invites reliance on personal values and attitudes and leaves considerable scope for class bias in decision making.¹⁰¹

Custody decisions are influenced by many factors; poverty is one of them. The parent of a child in foster care is typically poor, uneducated and a member of a minority group. Therefore, in the contest between natural parent and foster parent, it is the natural parent who is likely to be at a disadvantage in the learning process.¹⁰² This Court noted that for such a parent litigation may be especially "burdensome", *Stanley v. Illinois*, 405 U.S. 645, 648 (1972). The parent may be

¹⁰¹See generally R. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law & Contemporary Problems 226, 255 (1975).

¹⁰²See Ten Broek, California's Dual System of Family Law; Its Origins, Development and Present Status (pts. 1, 2), 16 Stan. L. Rev. 257, 900 (1964) (pt. 3), 17 Stan. L. Rev. 614 (1965). Ten Broek argues that there is in fact a dual system of family law—one law for the poor, another law for the rest of society. Demonstrative of the inequality inherent in the dual system is the burden of proof case on the poor person, whatever the issue may be, to make a case in his favor. See W. Weyrauch, Dual Systems of Family Law: A Comment in Ten Broek, *The Law of the Poor*, 457, 458.

unable to obtain counsel. He or she will almost certainly be unable to afford the costly expert testimony of psychiatrists and psychologists which is often crucial in custody contests. The New York Court of Appeals has recognized the problems:

In custody matters parties and courts may be very dependent on the auxiliary services of psychiatrists, psychologists, and trained social workers. This is good. But it may be an evil when the dependence is too obsequious or routine or the experts too casual. Particularly important is this caution where one or both parties may not have the means to retain their own experts or experts compensated only by one side have uncurbed leave to express opinions which may be subjective or are not narrowly controlled. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976).

For these reasons, the hearings impose a substantial impediment to the return of children to their parents. This Court has recognized that the imposition of a litigational burden can itself cause an unconstitutional detriment. *Stanley v. Illinois*, supra; *Armstrong v. Manzo*, 380 U.S. 545; *Speiser v. Randall*, 357 U.S. 513. The imposition of such a burden cannot be constitutionally supported simply in the name of "salutary" information gathering. Yet, as will be discussed in the following points, the hearings are of no value to the children involved.

D. Existing procedures in the New York State statutory scheme adequately protect the foster child who is returning home.

Without conceding that either foster parents or foster children were constitutionally entitled to the relief granted them by the district Court, it should be clear

that in fact New York State law already provides foster parents and foster children with a variety of procedures judicial and administrative for the protection of the child in foster care who is about to be returned home.

As Judge Pollack's dissenting opinion below points out, no showing has been made that agencies take undue risks in returning children to their parents. Strong safeguards for the correctness of this decision are provided first of all by New York's child protective laws.

An agency worker possessed of information—from any source—including informal communication from the foster parent, or the child that a child might be abused or neglected if returned to his or her parent would be doing so at considerable peril to herself. In 1973, New York State passed the Child Protective Service Act as part of its Social Services Law (S.S.L. 411 *et. seq.*) Together with the Departmental Regulations which followed (18 N.Y.C.R.R. §480.1 *et seq.* it provided, *inter alia*, a seven day a week, 24 hour a day Central Registry of child abuse (S.S.L. 422); mandatory reporting by certain professions (S.S.L. 414, 416, 418); and procedures for adequately investigating these reports (18 N.Y.C.R.R. 460.3). A worker in an agency who failed to report such suspicion is guilty of a Class A Misdemeanor (S.S.L. 420(1) and civilly liable as well. (S.S.L. 420(2)).

On the other hand an agency erroneously filing a report of abuse or neglect in good faith is protected from liability (F.C.A. §1024). If there is any indication that the natural parent would be neglectful or even that the child would be in imminent danger of becoming neglected—an Article 10 proceeding would begin [F.C.A. 1012, 1013(d), 1032, 1033]. In these proceedings counsel for the child is always appointed (F.C.A. §249). The definitions of abused or neglected

children are broad enough to include situations of imminent and potential danger. F.C.A. §1012(e) & (f).

Further, the foster parents are permitted under this system to make a report of suspected abuse or neglect (S.S.L. §414) and to have direct access to the Court if such report is not acted upon (F.C.A. 1033). Thus the New York Child Protective Laws, combined with the natural tendency of child care agencies to take undue risks, prevents the careless return of children to their families, and a judicial procedure to avert it.

Further, the terms of S.S.L. §384(a) requires the agency to consider the risk of neglect or abuse, require the agency to take it into account when responding to a parent's request for the return of a child. Finally the 18 N.Y.C.R.R. 450.10 conference itself is an adequate opportunity for the foster parents to inform the agency of facts indicating possible neglect or abuse.

Social Services Law §392 review is mandated for every child 18 months after placement, regardless of the length of time a child has spent in a particular foster home; it is a full judicial proceeding.

In the 392 proceeding foster parents can by Order to Show Cause and Stay secure a review of the proposed move of the foster children in their care, *Matter of Dionisio R.*, Misc.2d 436, 366 N.Y.S.2d 280 (Family Court, New York County 1975); *In re Custody of Mack*, 81 Misc.2d 802, 367 N.Y.S.2d 644 (Family Court, Queens Co. 1975). In the Social Services Law §392 proceeding an indigent foster parent is even provided with assigned counsel, Family Court Act §262. Foster parents' right to resort to these remedies is not barred by the fact that children are in their physical custody, *Hicks v. Bridges*, 2 A.D. 335, 155 N.Y.S.2d 746 (App. Div. 1st Dept., 1956); *Application of Chin*, 41 Misc.2d 641, 246 N.Y.S.2d 306, 41 Misc.2d 650, 246 N.Y.S.2d 316 (1963). Social Services Law

§392 among other things a custody proceeding. In any custody proceeding the trial Court has power to issue stays. Such a stay was issued even in *In re W.*, 77 Misc.2d 374, 355 N.Y.S.2d 245 (Family Court, New York County 1974) the only case relied on by the district Court in its discussion of Social Services Law §392 proceedings.¹⁰³

In a foster care review proceeding, the Court has the power to order that the child remain with a particular foster parent. *Matter of Cynthia S.*, 74 Misc.2d 935 (Family Court, N.Y. Co. 1973); *Guardianship of Denlow*, 384 N.Y.S.2d 621 (Fam. Ct., Kings Co., 1976); (Fam. Ct., Suffolk Co. 1976). See also *Matter of Mark H.*, 80 Misc.2d 593 (Fam. Ct., St. Lawrence Co., 1974), where the judge ordered the agency not to remove the child from the foster home without specific direction from the Court. The Family Court in foster care review proceedings has the same equitable powers as it does in any other proceeding. S.S.L. § 371-a, F.C.A. § 165(b); and for the reasons given in cases cited the Family Court may make such an order.

In a foster care review proceeding, the Family Court has continuing jurisdiction, and a new petition may be filed at any time by any of the parties. S.S.L. §392(10); *Matter of Anonymous*, 48 App. Div.2d 696 (2d Dept. 1975) rev. on other grds. 40 N.Y.2d 96 (1976). Thus when an agency threatens to remove a foster child, the foster parent may petition by Order to Show cause for a new foster care review, even if

¹⁰³Joint Appendix p. 14a; fn 15, p. 20a. It is not clear whether foster parents may initiate habeas corpus proceedings against the child's parents cf. *Matter of Kurtis v. Ballou*, 33 App. Div.2d 1034 (2d Dept. 1970), they may do so against non-parents however, *Matter of Reed v. Daniels*, 45 App. Div.2d 990 (4th Dept. 1974).

twenty-four months have not elapsed since the last review, *Sugarman v. Speller*, 48 App. Div.2d 644 (1st Dept. 1975), even against the child's parents, in *In re Zweibel*, 79 Misc.2d 366, 358 N.Y.S.2d 795 (Fam. Ct., Nassau County 1974). In the *Zweibel* case no prior hearing was possible because the mother simply took the child home before legal process was possible.

Further, in the 392 review the Family Court may assign a law guardian-independent counsel—for the child pursuant to Family Court Act §249, and in fact the Family Court usually does so in any contested 392 proceeding. See, for example, *In re Spencer*, 74 Misc.2d 557, 346 N.Y.S.2d 645 (Family Court, New York County 1973); *Matter of Carla L.*, 45 A.D.2d 375, 357 N.Y.S.2d 987 (App. Div. 1st Dept. 1974); *Matter of Dionisio R.*, *supra*; *In re Zweibel*, 79 Misc.2d 366, 358 N.Y.S.2d 795 (Family Court, Nassau County 1974); *In the Matter of Mark H.*, 80 Misc.2d 593, 363 N.Y.S.2d 73 (Family Court, St. Lawrence Co., 1974); *In re Janice K.*, 82 Misc.2d 983, 372 N.Y.S.2d 381 (Family Court, New York County, 1975). The Gandy children had such counsel. See AA "11". The provision for independent representation of children made by the district Court is in fact less than what is already provided under existing procedures. All named foster parents in this action were parties to Social Services Law §392 proceedings concerning the foster children in their care, at the time this action was commenced.

With respect to the Gandy children, the agency postponed their removal from the foster home of Mrs. Smith because a Social Services Law §392 review hearing concerning these children had already been scheduled in the New York Family Court for April 24, 1976, with Mrs. Smith as a party.¹⁰⁴ On that date Mrs. Smith appeared and secured an adjournment from the Court so that she could retain counsel.¹⁰⁵ Mrs. Smith

¹⁰⁴A 7a #42, Affidavit of Graber.

¹⁰⁵R. 50 pp. 25-26.

then secured the services of Ms. Lowry, who however, instead of returning to Family Court, instituted this action.

In the case of Appellees Goldberg, Mrs. Goldberg testified that the only time the removal of Rafael Serrano from that foster home was concretely discussed was by the Family Court Judge at a 392 review hearing; a 392 hearing in that case was in progress when she joined this action.¹⁰⁶ A 392 review had been held for the Wallace children in 1972, with the Lhotans as parties, and the Family Court had continuing jurisdiction pursuant to Social Services Law §392 (10). (A. p. 304a). Complementing those judicial and administrative proceedings are internal agency review mechanisms and extensive record keeping requirements and practices,¹⁰⁷ and agencies have extensive information concerning the children in their care, their parents and foster parents.

When the Court below suggested that hearings would serve a valuable "information gathering" function, the only example given of information to be gathered was "the frequency with which the biological parent had been visiting his or her child".¹⁰⁸ The Court here revealed its misunderstanding of the actual working of foster care system: visiting between parents and children in foster care is controlled and supervised by

¹⁰⁶R-84 pp. 134-135, 139-141; R-Affidavit of Louise Gruner Gans, 10/25/74.

¹⁰⁷S.S.L. §372; 18 N.Y.C.R.R. 450.2(c)(1), (c)(2) and the successor regulations 18 N.Y.C.R.R. 606.12, 606.15, 606.16 and Rule 4.7 of the New York State Board of Social Welfare Rules 18 N.Y.C.R.R. Part 1, and require extensive and detailed record keeping. See A p. 95a-Form W853.

¹⁰⁸A.J.S. "A" p. 10a.

the agencies.¹⁰⁹ The foster parents generally do not even know the natural parents so they are a most unlikely source of information about them.¹¹⁰

Foster parents do not have the competence to plan for the child. They do not have access to the full information besetting the child's family, they do not have, by training, the ability to appraise the child's vulnerability.¹¹¹

An additional factor which prevents the careless return of children to their parents is the tendency of New York public agencies to err in the opposite direction. Indeed the cases of two parents involved in this action illustrate this tendency.

In the case of the Wallace children, the decisions of the Trial Court and of the Appellate Court in *State ex. rel. Wallace v. Lhotan*, 51 A.D.2d 252, A.A. "9" show that the Nassau County Children's Bureau social workers confronted with the problem of growing hostility on the part of the children toward their mother,¹¹² proceeded with extreme caution. Only after

¹⁰⁹Tr. 52-53, 82, 106, 119. See Special Services for Children, Policy Statement on Parental Visiting AA "8".

¹¹⁰Thus, in a recent foster care review proceeding pursuant to Social Services Law §392, the foster parents sought discovery of the agency's records on the basis of "the absence of knowledge on the foster parents' part as to the biologic [sic] parents." *Matter of Louis F.*, New York Law Journal, 11/1/76 p. 1, Col. 8 (Appellate Division, First Judicial Department (A.A. "12")).

¹¹¹A. Fanshel p. 164a.

¹¹²Professor Fanshel testified that: "... it's not infrequent to find agencies working with the problem of the foster parents being inhospitable to their own parent, or feeling that since they offer such superior care, why don't they take full possession of the child," A. Fanshel p. 162a, and that the effect of this is "to burden the foster child with a problem in counterpulls and identification," A. Fanshel p. 165a.

numerous visits to the Lhotan home in an effort to ameliorate the situation over a period of at least nine months, and only after professional consultation with two psychiatrists, a psychologist and a social worker, was the decision reached to return the two younger girls home immediately with the older ones to follow. The problem was not a lack of information. Although the agency had returned the two Wallace boys to Mrs. Wallace in 1972 and had found that she had the "capacity to mother appropriately" they nevertheless proceeded with extreme caution before making their decision to return the children home. The return was eventually sustained by the New York Courts as in the children's best interest.

The case of Appellant Naomi Rodriguez also illustrates the tendency of agencies to be very cautious and reluctant to discharge children. Mrs. Rodriguez placed the infant Edwin in foster care because of her marital difficulties and not because of her blindness. Throughout this time she continued to care for her older child without any difficulty, even after she had separated from her husband.¹¹³ Nevertheless, the agency, concerned about her blindness and the small size of her apartment, refused to return Edwin. The opinion of the Appellate Division ultimately ordering his return to Mrs. Rodriguez suggests the agency acted with too much caution rather than too little. 52 A.D.2d 299, 383 N.Y.S.2d 883 (1st Dept. 1976).

The testimony of the directors of three authorized child care agencies as to the manner in which they reach a decision to return a child home to his or her parents is entirely consistent with these cases. It is a slow and deliberate process taking months or even years¹¹⁴ where decisions are made with the help of child

¹¹³A p. 68a.

¹¹⁴A Edwards p. 292a T106-107.

psychiatrists,¹¹⁵ and always reviewed on several staff levels at the agency.¹¹⁶ If anything, agencies have been excessively careful, slow and deliberate. The New York Temporary State Commission on Child Welfare has reported that, because funds for foster care services depend on children being in placement, "it is not only fiscally desirable, but advantageous for local agencies to maintain children in foster care."¹¹⁷ This factor tends to contribute to the deliberateness of the discharge process. Neither deliberateness nor information are lacking. The extent and variety of safeguards surrounding agency decisions to return children to their parents suggest that the creation of another administrative procedure parallel to and conflicting with the provisions of S.S.L. §392, 384-a and 383(1) is not required to minimize risk of overall error, *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Fusari v. Steinberg*, 419 U.S. 379, 383 fn6 (1975) but it will surely create havoc in the operation of the foster care system.

E. It was error to hold that prior hearings are required when children have been in foster care after exactly one year; the court had no basis for fixing this time period.

The majority opinion held that hearings are required prior to returning a child home after the children have lived in foster care exactly one year.

¹¹⁵A Creech 276a-277a T54-55.

¹¹⁶A Edwards 288a-299a T4-5, 95-96.

¹¹⁷*The Children of the State II Annual Report 1976 of the Temporary State Commission on Child Welfare*, Albany, New York 1976, p. 19.

The opinion provides no explanation of the significance of the one year measure, but merely accepts the time measure suggested by the foster parents to define the class. No witness testified that anything significant in a child's development in foster care occurred at *one year* as opposed to any other time period. On the contrary, the testimony was that one year had no special significance.¹¹⁸ Witnesses repeated described time measurement as "arbitrary"¹¹⁹

Professor Eugene Weinstein testified:

My data would imply that the costs to a child of being pushed to abandon its relationship with its natural parents or the failure to take advantage of opportunities to return the child to its natural parents when the child has an attachment to them would be riskier than leaving them in a foster home automatically by virtue of the fact that he has spent one year in that home.

There is no evidence in the record to suggest that time periods selected by the legislature for recognizing the interests of foster parents in relation to foster children pursuant to Social Services Law §392 and 383(3) are irrational or unreasonable. As Judge Pollack pointed out in his dissent,¹ since the New York Legislature does not permit any legal recognition of a child's relationship to foster parents as against the child's own parents until the child had been in foster care for 24 months, and the time measures were not shown to be irrational or unfair, the district Court should have deferred to the judgment of the New York State Legislature instead of legislating by judicial fiat. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹¹⁸"One year for a newborn infant is 100 percent of his life. One year for a 10 year old child is a tenth of his life. It is entirely different durations of separation, entirely different meaning." (R-92 Grunebaum, pp. 29-30).

¹¹⁹A Goldstein p. 204a; A Fanshel p. 117a.

The decision of the district Court to require hearings at the one year period is particularly shocking because there was no need for it in relation to any foster parents or foster children who were before the Court.

They all had Social Services Law §392 proceedings available to them to contest the removal of the foster children.

III.

THE DISTRICT COURT ERRED IN CERTIFYING THE CHILDREN AS A CLASS BECAUSE THE REQUIREMENTS OF RULE 23(a)(3) AND 23(a)(4) WERE NOT MET.

Although Helen Bittenwieser as counsel for the children never moved to have a class of children certified,¹²⁰ on March 22, 1976 Judge Carter certified a class of children who had been in foster care in a particular foster home for at least one year. This class certification was in error because the claims of the named children are not typical of the claims of the class, nor can these fairly and adequately represent the class, as required by Rule 23 of the Federal Rules of Civil Procedure.

In three material areas, the named children were atypical of the class which the Court below held they represented. First, while the named children had been in foster care at least four years when the action was commenced, the class consists of all children who have been in foster home care for one year or more. It was

¹²⁰Counsel for the foster parents made such a motion prior to her removal as counsel for the children. It should be noted that Judge Carter explicitly ruled that she was not capable of representing the children fairly.

not and cannot be disputed that four years in foster care is substantially longer than one year. The effect on children of leaving a foster home after four years as opposed to one year or even two years is likely to be substantially different.

The named children thus have no standing to represent these other children who are not injured as the District Court thought the named children were injured.

As this Court held in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974):

To have standing to sue as a class representative it is essential that the plaintiff must be part of that class; that is, he must possess the same interest and suffer the same injury *shared by all members of the class he represents*. [Emphasis added.]

Second, none of the named children had seen their parents in more than a year. Since the class certified includes children who see their parents frequently, the named children are again not typical of all the members of the class and the class was overly broad. Again, it was not disputed that parental visiting of children in foster care is of utmost importance in maintaining a relationship between parent and child and in facilitating the return of the child to his family.

Children who have continuing relationships to their parents while in foster care are less likely to wish to remain in foster care; they are consequently less likely to wish to have a hearing prior to returning to their parents than are children who, like the named children, have not seen their parents for an extended period of time.

Finally, all the named children had "warm and loving" relationships with their foster parents. It was these relationships which the hearing sought was to safeguard. Many members of the class of children who

have been in foster care for one year or more do not have such warm relationships to their foster parents and are eager to leave. To them a hearing is merely a barrier to their leaving an unfriendly or uncomfortable environment. The named children's claims are not typical of these children either; since the class as certified includes them, it is overly broad. *Taylor v. Safeway Stores, Incorporated*, 524 F.2d 263 (10th Cir. 1975); *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

The named children cannot adequately represent the class since many members of the class want to return home as quickly as possible and do not want a pre-removal hearing to delay their return. A class representative may not maintain a class suit if his interests are antagonistic to some of the persons he claims to represent, *Phillips v. Klassen*, 502 F.2d 362 (D.C. Cir. 1974), cert. den. 419 U.S. 996 (1974), *Schy v. Susquehanna Corporation*, 419 F.2d 1112 (7th Cir. 1970), cert. den. 400 U.S. 826 (1970), or if some class members benefit by a challenged law and want it upheld, *Swarb v. Lennox*, 314 F.Supp. 1091 (E.D. Pa. 1970), aff'd 405 U.S. 191 (1972), reh. den. 405 U.S. 1049 (1972), *Ward v. Luttrell*, 292 F.Supp. 165 (E.D. La. 1968), because a person cannot adequately protect those with interests contrary to his own. *Hansberry v. Lee*, 311 U.S. 32 (1940).

Even counsel for the foster parents, who originally sought to represent the children also, has recognized the antagonistic interests among foster children. In *Child v. Beame*, 412 F.Supp. 593 (S.D.N.Y. 1976), she argued that foster care harmed children who had been or "should be" freed for adoption, in that it denied them the right to a "permanent stable home," 412 F.Supp. at 596, and constituted "cruel and unusual punishment" and "violation of the right to treatment," 412 F.Supp. at 608. Many members of the class in the instant action are also members of the class in *Child v. Beame*,

including Rafael Serrano.¹²¹ Counsel's conflicting claims on behalf of the same children are logically inconsistent.

The court must also look at "any other facts bearing on the ability of the named party to speak for the proposed class." *duPont v. Perot*, 59 F.R.D. 404, 410 (S.D.N.Y., 1973).

The New York courts found that the Wallace girls were so under the control of their foster mother that their expressed wishes were contrary to their actual interests. *State ex rel. Wallace v. Lhotan*, 51 App. Div.2d 252, 380 N.Y.S.2d 250 (2d Dept. 1976), motion for lv. to App. den. 39 N.Y.2d 705 (1976). These children whom the foster parents would have acted as representatives of the class, are not able to protect even their own interests adequately. They certainly cannot be said to protect adequately the interests of the entire class. Class certification should have been denied.

Class action motions should not be granted as a matter of course. Since absent members of the class will be bound by the judgment, a court must carefully examine the class the named party purports to represent, to decide if it is a true class and the party is a proper and adequate representative. *Green v. Wolf Corporation*, 406 F.2d 291, 298 (2d Cir. 1968), cert. den. 395 U.S. 977 (1969), *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir., 1968), rev. other grounds 417 U.S. 156 (1974); *Rutledge v. Electric Hose & Rubber Company*, 511 F.2d 668, 673 (9th Cir. 1975). In doing so, the requirements of Rule 23(a) must be "strictly construed and stringently applied" in order to protect the absent class members. *Hettinger v. Glass Specialty Co., Inc.*, 59 F.R.D. 286, 296 (N.D. Ill. 1973). This the District Court did not do.

¹²¹Rafael was a child who "should have been freed for adoption," Complaint, R12, and whose foster parents did not want to adopt him (T135-136, 143-144).

If a proposed class does not meet the requirements of Rules 23(a)(3) and (4), a court must do one of two things. Either it must deny certification, cf. *City of Chicago v. General Motors Corporation*, 332 F.Supp. 285, 288 (N.D. Ill. 1971), aff'd 467 F.2d 1262 (7th Cir. 1972); *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207-208 (D.C. 1969); *Koehler v. Ogilvie*, 53 F.R.D. 98 (N.D. Ill. 1971), aff'd mem. 405 U.S. 906 (1972); or it must narrow the class sufficiently to meet those requirements. Cf. *Elkind v. Liggett & Myers, Inc.*, 66 F.R.D. 36 (S.D.N.Y. 1975); *Insley v. Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1971); *Equal Employment Opportunity Commission v. Detroit Edison Company*, 515 F.2d 301 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3214; *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196 (N.D. Ga. 1975); *Swarb v. Lennox, supra*.

In the instant case the antagonism between those children who wish to have hearings and those who do not is dependent on individual factors, and would require the Court to look into the circumstances of each child and his family to determine whether or not the child should be a member of the class. The class is therefore incapable of definition, *Koen v. Long*, 302 F.Supp. 1383 (E.D. Mo. 1969), aff'd per curiam 428 F.2d 876 (8th Cir. 1970), cert. den. 401 U.S. 923 (1971); *Chaffee v. Johnson*, 229 F.Supp. 445 (S.D. Miss. 1964), aff'd other grounds 352 F.2d 514 (5th Cir. 1965), cert. den. 384 U.S. 956 (1966), and it was error for the Court to certify it.

IV.

THE REFUSAL TO PERMIT INTERVENORS TO RAISE AND PROVE THEIR DEFENSES WAS ERROR.

The District Court erred in striking intervenors' fourteenth affirmative defense and in refusing to let intervenors present testimony at trial. A party who intervenes in an action as a matter of right, under Rule 24(a), has the right to litigate fully the merits of the action, 3B *Moore's Federal Practice* ¶ 24.16 [1], at 24-593, *In re Oceana International, Inc.*, 49 F.R.D. 329, 333 (S.D.N.Y. 1970); and is for all purposes an original party. *In re Raabe, Glissman & Co., Inc.*, 71 F.Supp. 678, 680 (S.D.N.Y. 1947). He must be allowed to raise and litigate and defense, counterclaim, or cross-claim which he may have. *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, 325 F.2d 822, 827 (2d Cir. 1963), cert. den. 376 U.S. 944 (1964); *Chalmers v. United States*, 43 F.R.D. 286, 289 (D. Kan. 1967).

In the instant case, the court below struck intervenors' defense that they relied on the placement forms and the representations of agents of the City that the placement of their children would be with an authorized agency and not with individual foster parents. Additionally, the court permitted only one of intervenors' witnesses to testify, and her testimony was terminated prematurely. As a result of this, intervenors were in effect barred from making their case at trial.

By listening to testimony from one side only, the Court was able to base its decision on the assumption that parents are not involved in the foster care system, when this is not the case (A. 307a). The parents' witnesses wanted to show that, contrary to the individual experiences of the two foster parents who

testified, parents of children in foster care are very much involved in the lives of their children. They maintain strong attachments to their children through frequent visiting (A. 309a, 70a, 74a-75a), and the children adjust readily to their return home (A. 307a, 309a).

Plaintiff foster parents were permitted to testify at length and in detail. That the court carefully considered their claims is evident from the long discussion of each of the named foster parents in the decision of the court below. The natural parents, however, were not permitted to present any evidence. The Court, in permitting the natural parents to intervene, recognized that they have an interest in their own children, but then refused them to present evidence of their interest. This refusal was erroneous. *Stewart-Warner Corporation v. Westinghouse Electric Corporation*, *supra*. As the Court held in *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969), vacated and remanded on other grounds, ____ U.S. ____, 96 S.Ct. 2697 (1976), citing 4 *Moore's Federal Practice*, ¶ 24.16 [4] p. 117 (2d ed. 1968):

It would be meaningless to give [a party] an absolute right to intervene in order to protect his interests, if once in the proceedings he was barred from raising questions necessary for his own protection.

Id. at 1245.

See also *Harrison v. Nixon*, 9 Pet. 483 (1835), where intervenors were permitted wide latitude in their defenses.

The failure to permit intervenors to raise their defenses severely prejudiced them. They were never permitted to offer anything to counter plaintiff's charges that they were unfit parents. They were also not permitted to show that agencies do not return

children arbitrarily but in fact are extremely cautious and frequently refuse to return children despite the parents' readiness and attempts to get them back.¹²²

The striking of intervenors' defense of reliance precluded intervenors from showing that if the foster care system is to continue, parents must be able to rely on the ability of the State to return children when the State and parents agree that the children should come home. Otherwise, parents will not voluntarily place their children in foster care, sometimes to the detriment of the entire family in distress.

The failure to permit intervenors to raise and prove their defenses rendered their intervention meaningless; and in adjudicating the claims without permitting intervenors to raise defenses to them, the Court denied intervenors due process of law. *Lindsay v. Normet*, 405 U.S. 56, 66 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Reynolds v. Cochran*, 365 U.S. 525, 530-531 (1961).

CONCLUSION

Wherefore, Appellants Rodriguez et al, parents of children voluntarily placed in foster care, respectfully pray that the Order and Judgment below be reversed and the Second Amended Complaint be dismissed, or that the Order and Judgment of the district Court be reversed to the extent it deprives public child care agencies of the power to consent to the return of

¹²²(A. 306a, 70a-72a, 74a-75a).

children to their parents and to deprive the parents of the right to have their children returned to them, and for such other and further relief as to the Court may seem just.

New York, New York

Dated: December 17, 1976

Respectfully submitted,

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APPENDIX 1

CHALLENGED STATUTES AND REGULATIONS

New York Social Services Law § 383(2):

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

New York Social Services Law § 400: Removal of Children.

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on its own motions [sic], review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied with by the public welfare officials thereof.

18 N.Y.C.C.R. §450.14* Removal from foster family care.

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing, of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and require any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the ten day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall

send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

APPENDIX 2

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV.

"... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

*This regulation was renumbered 450.10 as of September 18, 1974.

APPENDIX 3

OTHER NEW YORK SOCIAL SERVICES
LAW PROVISIONS

New York Social Services Law § 383. Care and custody of children

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

3. Any adult husband and his adult wife and any adult unmarried person, who, as foster parent or parents, have cared for a child continuously for a period of two years or more, may apply to such authorized agency for the placement of said child with them for the purpose of adoption, and if said child is eligible for adoption, the agency shall give preference and first consideration to their application over all other applications for adoption placements. However, final determination of the propriety of said adoption of such foster child shall be within the sole discretion of the court, as otherwise provided herein.

Foster parents having had continuous care of a child, for more than twenty-four months, through an authorized agency, shall be permitted as a matter of right, as an interested party to intervene in any proceeding involving the custody of the

child. Such intervention may be made anonymously or in the true name of said foster parents.

New York Social Services Law § 384-a. Transfer of care and custody of children

1. Method. The care and custody of a child may be transferred by a parent or guardian to an authorized agency by a written instrument in accordance with the provisions of this section.

2. Terms. (a) The instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. The department may promulgate suggested terms and conditions for inclusion in such instruments, but shall not require that any particular terms and conditions be included. If the instrument provides that the child is to be returned by the authorized agency on a date certain or upon the occurrence of an identifiable event, such agency shall return such child at such time unless such action would be contrary to court order entered at any time prior to such date or event pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. The parent or guardian may, upon written notice to such agency, request return of the child at any time prior to the identified date or event, whereupon such agency may, without court order, return the child or, within ten days after such request, may notify the parent or guardian that such request is denied. If such agency denies or fails to act upon such request, the parent or guardian may seek return of the care or custody of the child by petition in family court for return of such child and order to show cause, or by writ of habeas corpus in the supreme court. If the instrument fails to specify a date or identifiable event

upon which such agency shall return such child, such agency shall return the child within ten days after having received notice that the parent or guardian wishes the child returned, unless such action would be contrary to court order entered at any time prior to the expiration of such ten day period pursuant to section three hundred eighty-four or section three hundred ninety-two of this chapter or article six or article ten of the family court act. Expenditures by a social services district for the care and maintenance of a child who has been continued in the care of an authorized agency in violation of the provisions of this subdivision shall not be subject to state reimbursement.

(b) No provisions set forth in any such instrument regarding the right of the parent or guardian to visit the child or to have services provided to the child and to the parent or guardian to strengthen the parental relationship may be terminated or limited by the authorized agency having the care and custody of the child unless: (i) the instrument shall have been amended to so limit or terminate such right, pursuant to subdivision three of this section; or (ii) the right of visitation or to such services would be contrary to or inconsistent with a court order obtained in any proceeding in which the parent or guardian was a party.

(c) The instrument, or a separate statement appended thereto, shall include a recitation, in lay terms, advising the parent or guardian:

(i) that the law permits the instrument to specify a date certain or an identifiable event upon which the child is to be returned;

(ii) that the parent or guardian has a right to supportive services, to visit the child, and to have the child returned to him or her, in accordance with the terms of the instrument and subject to the provisions of this section;

(iii) that the parent or guardian, subject to the terms of the instrument, has an obligation

(A) to visit the child,

(B) to plan for the future of the child,

(C) to meet with and consult the agency about such plan,

(D) to contribute to the support of the child to the extent of his or her financial ability to do so, and

(E) to inform the agency of any change of name and address;

(iv) that the failure of the parent or guardian to meet the obligations listed in subparagraph (iii) could be the basis for a court proceeding for the commitment of the guardianship and custody of the child to an authorized agency;

(v) that the parent or guardian has a right at any time, including prior to the signing of the instrument, to consult an attorney. The agency shall provide the parent or guardian with a list of attorneys or legal services organizations, if any, which provide free legal services to persons unable to otherwise obtain such services.

3. Amendment. The parties to the instrument or anyone acting on their behalf with their consent may amend it by mutual consent but only by a supplemental instrument executed in the same manner as the original instrument. The supplemental instrument shall be attached to, and become part of, the original instrument. The supplemental instrument shall contain the recitation required in paragraph (c) of subdivision two.

4. Execution. The instrument shall be executed in the presence of one or more witnesses and shall include only the provisions, terms and conditions agreed upon by the parties thereto.

5. Records. The instrument shall be kept in a file maintained for that purpose by the agency accepting the care and custody of the child. A

copy of the instrument shall be given to the parent or guardian at the time of the execution of the instrument.

6. An instrument executed pursuant to the provisions of this section shall not constitute a remand or commitment pursuant to this chapter.

New York Social Services Law § 384-b. Guardianship and custody of destitute or dependent children; commitment by court order

1. Statement of legislative findings and intent.

(a) The legislature hereby finds that:

(i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;

(ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;

(iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home; and

(iv) when it is clear that the natural parent cannot or will not provide a normal family home for the child and when continued foster care is not an appropriate plan for the child, then a permanent alternative home should be sought for the child.

(b) The legislature further finds that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive,

nurturing family relationships and have deleterious effects on their development into responsible, productive citizens. The legislature further finds that provision of a timely procedure for the termination, in appropriate cases, of the rights of the natural parents could reduce such unnecessary stays.

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

2. For the purposes of this section, "child" shall mean a person under the age of eighteen years.

3. (a) The guardianship of the person and the custody of a destitute or dependent child may be committed to an authorized agency, or to a foster parent authorized pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act to institute a proceeding under this section, by order of a surrogate or judge of the family court, as hereinafter provided. Where such guardianship and custody is committed to a foster parent, the family court or surrogate's court shall retain continuing jurisdiction over the parties and the child and may, upon its own motion or the motion of any party, revoke, modify or extend its order, if the foster parent fails to institute a proceeding for the adoption of the child within six months after the entry of the order committing the guardianship and custody of the child to such foster parent. Where the foster parent institutes a proceeding for the adoption of the child and the adoption petition is finally denied or dismissed,

the court which committed the guardianship and custody of the child to the foster parent shall revoke the order committing the guardianship and custody of the child to a foster parent, it shall commit the guardianship and custody of the child to an authorized agency.

(b) A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act.

(c) Proceedings under this section shall be originated in the county in which the authorized agency has an office for the regular conduct of business or in which the child or his parent resides at the time of the initiation of the proceeding.

(d) The family court shall have exclusive, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (c) or (d) of subdivision four of this section, and the family court and surrogate's court shall have concurrent, original jurisdiction over any proceeding brought upon grounds specified in paragraphs (a) or (b) of subdivision four.

(e) A proceeding under this section is originated by a petition on notice served upon the child's parent or parents and upon such other persons as the surrogate or judge may in his discretion prescribe. Such notice shall inform the parents and such other persons that the proceeding may result in an order freeing the child for adoption without the consent of or notice to the parents or such other persons. Such notice also shall inform the parents and such other persons of their right to the assistance of counsel, including any right they may have to have counsel assigned by the court in any case where they are financially unable to obtain counsel. When the proceeding is

initiated in family court service of the petition and other process shall be made in accordance with the provisions of section six hundred seventeen of the family court act, and when the proceeding is initiated in surrogate's court, service shall be made in accordance with the provisions of section three hundred seven of the surrogate's court procedure act.

(f) In any proceeding under this section in which the surrogate's court has exercised jurisdiction, the provisions of the surrogate's court procedure act shall apply to the extent that they do not conflict with the specific provisions of this section. In any proceeding under this section in which the family court has exercised jurisdiction, the provisions of articles one, two and eleven of the family court act shall apply to the extent that they do not conflict with the specific provisions of this section. Any proceeding originated in family court upon the ground specified in paragraph (d) of subdivision four of this section shall be conducted in accordance with the provisions of part one of article six of the family court act.

(g) An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon a finding that one or more of the grounds specified in paragraphs (a), (b) or (d) of subdivision four are based upon a fair preponderance of the evidence, or upon a finding that one or more of the grounds specified in paragraph (c) of subdivision four are based upon clear and convincing proof.

(h) In any proceeding brought upon a ground set forth in paragraph (c) of subdivision four, neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section

forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social work-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(i) In a proceeding instituted by an authorized agency pursuant to the provisions of this section, proof of the likelihood that the child will be placed for adoption shall not be required in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency.

(j) The order and the papers upon which it was granted in a proceeding under this section shall be filed in the court, and a certified copy of such order shall also be filed in the office of the county clerk of the county in which such court is located, there to be recorded and to be inspected or examined in the same manner as a surrender instrument, pursuant to the provisions of section three hundred eighty-four of this chapter.

(k) Where the child is over fourteen years of age, the court may, in its discretion, consider the wishes of the child in determining whether the best interests of the child would be promoted by the commitment of the guardianship and custody of the child.

4. An order committing the guardianship and custody of a child pursuant to this section shall be granted only upon one or more of the following grounds:

(a) Both parents of the child are dead, and no guardian of the person of such child has been lawfully appointed; or

(b) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, abandoned such child for the period of six months immediately prior to the initiation of the proceeding under this section; or

(c) The parent or parents, whose consent to the adoption of the child would otherwise be required in accordance with section one hundred eleven of the domestic relations law, are presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the proceeding under this section; or

(d) The child is a permanently neglected child.

5. (a) For the purposes of this section, a child is "abandoned" by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

(b) The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting such intent, shall not preclude a determination that such parent has abandoned his or her child. In making such determination, the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in paragraph (a) of this subdivision.

6. (a) For the purposes of this section, "mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment of such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(b) For the purposes of this section, "mental retardation" means sub-average intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act.

(c) The legal sufficiency of the proof in a proceeding upon the ground set forth in paragraph (c) of subdivision four of this section shall not be determined until the judge has taken the testimony of a physician and psychologist, or psychiatrist, in accordance with paragraph (e) of this subdivision.

(d) A determination or order upon a ground set forth in paragraph (c) of subdivision four shall in no way affect any other right, or constitute an adjudication of the legal status of the parent.

(e) In every proceeding upon a ground set forth in paragraph (c) of subdivision four the judge shall order the parent to be examined by, and shall take the testimony of, a physician and a certified psychologist, in the case of a parent alleged to be mentally retarded, or of a psychiatrist, in the case of a parent alleged to be mentally ill, such physician, psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to submit

other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed physician, psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

7. (a) For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court.

(b) For the purposes of paragraph (a) of this subdivision, evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact.

(c) As used in paragraph (a) of this subdivision, "to plan for the future of the child" shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

(d) For the purposes of this subdivision:

(i) A parent shall not be deemed unable to maintain contact with or plan for the future of the child by reason of such parent's use of drugs or alcohol, except while the parent is actually hospitalized or institutionalized therefor;

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) The time during which a parent is actually hospitalized, institutionalized, or incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

(e) Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when the parent has failed for a period of six months to keep the agency apprised of his or her location.

(f) As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child;

(3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and

(4) informing the parents at appropriate intervals of the child's progress, development and health.

8. Nothing in this section shall be construed to terminate, upon commitment of the guardianship and custody of a child to an authorized agency or foster parent, any rights and benefits, including but not limited to rights relating to inheritance, succession, social security, insurance and wrongful death action claims, possessed by or available to the child pursuant to any other provision of law.

New York Social Services Law § 392. Foster care status; periodic family court review

1: As used in this section, unless otherwise expressly stated or unless the context requires a different interpretation, (a) "foster care" shall mean care provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, or any combination thereof; (b) "child" shall mean a child under the age of eighteen years whose guardianship and custody have been committed to an authorized agency pursuant to section three hundred eighty-four of this chapter by an order of a surrogate or judge of the family court or by a surrender instrument, or whose care and custody have been transferred to an authorized agency by an instrument executed pursuant to section three hundred eighty-four-a of this chapter, or whose custody has

been temporarily or permanently awarded to an authorized agency by a judge of the family court pursuant to a finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act.

2. Where a child has remained in foster care for a continuous period of eighteen months* a petition to review the foster care status of such child:

- (a) shall be filed in the family court by the authorized agency charged with the care, custody or guardianship of such child;
- (b) may be filed by another authorized agency having the supervision of such foster care;
- (c) may be filed by the foster parent or parents in whose home the child resides or has resided during such period of eighteen months.

In the event that a child in foster care is returned to his parent or parents and, within three months of such return, is again placed under the care of an authorized agency, such period of return shall not constitute an interruption of continuous foster care for the purposes of review pursuant to this section. However, the period of return shall not be considered to be a part of any continuous period of foster care for the purposes of determining the length of time that a child may have been in foster care.

3. Such petition:

- (a) shall be filed in the family court in the county in which the authorized agency charged with the care, custody or guardianship of such child has its principal office or where the child resides;
- (b) shall set forth the disposition sought and the grounds therefor;
- (c) shall, when filed by an authorized agency and notice is to be given to a parent, guardian or relative of the child, omit, for good cause shown,

*The 18 months time period was introduced by amendment in 1975 (Chapter 708), laws of 1975.

the name and address of the foster parent or parents with whom such child is residing at the time of the filing of the petition, and, in lieu thereof, there shall be filed with such petition a verified schedule executed by such agency setting forth the name and address of such foster parent or parents.

4. Notice of the hearing, including a statement of the dispositional alternatives of the court, shall be given and a copy of the petition shall be served upon the following, each of whom shall be a party entitled to participate in the proceeding:

- (a) the authorized agency charged with the care, custody or guardianship of such child, if such authorized agency is not the petitioner;
- (b) the authorized agency having supervision of such foster care, if such authorized agency is not the petitioner;
- (c) the foster parent or parents in whose home the child resided or resides at or after the expiration of a continuous period of eighteen months in foster care;
- (d) the parent or guardian who transferred the care and custody of such child temporarily to an authorized agency;
- (e) such other persons as the court may, in its discretion, direct.

5. Service of notice of the hearing and the petition shall be made in such manner and on such notice as the court may, in its discretion, prescribe.

6. The court may, in its discretion dispense with the attendance of the child at the hearing or may, with the consent of the parties, dispense with the hearing and make a determination based upon papers and affidavits submitted to the court.

7. At the conclusion of such hearing, the court shall, upon the proof adduced, in accordance with the best interest of the child, enter an order of disposition:

- (a) directing that foster care of the child be continued; or
- (b) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the child be returned to such parent, guardian or relative; or
- (c) in the case of a child who has been committed temporarily to the care of an authorized agency by a parent, guardian or relative, directing that the agency institute a proceeding to legally free such child for adoption, and upon a failure by such agency to institute such a proceeding within thirty days after entry of such order, permitting the foster parent or parents in whose home the child resides to institute such a proceeding; or
- (d) in the case of a child whose guardianship and custody have been committed to an authorized agency by an order of a surrogate or judge of the family court or by a surrender instrument or who has been judicially declared to be a permanently neglected child, directing that such child be placed for adoption in the foster family home where he resides or has resided or with any other person or persons.

An order of disposition entered pursuant to this subdivision shall include the court's findings supporting its determination that such order is in accordance with the best interest of the child. If the court promulgates separate findings of fact or conclusions of law, or any opinion in lieu thereof, the order of dispositions may incorporate such findings and conclusions, or opinions, by reference.

8. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by a person or agency who is before the court and may require

any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe.

9. The court may make an order directing an authorized agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the moral and temporal welfare of the child. Such order may include a specific plan of action for the authorized agency including, without limitation, requirements that such agency assist the parent in obtaining adequate housing, employment, counseling, medical care or psychiatric treatment.

10. The court shall possess continuing jurisdiction in proceedings under this section and, in the case of children who are continued in foster care, shall re-hear the matter whenever it deems necessary or desirable, or upon petition by any party entitled to notice in proceedings under this section, but at least every twenty-four months.

New York Social Services Law §411. Findings and purpose

Abused and maltreated children in this state are in urgent need of an effective child protective service to prevent them from suffering further injury and impairment. It is the purpose of this title to encourage more complete reporting of suspected child abuse and maltreatment and to establish in each county of the state a child protective service capable of investigating such reports swiftly and competently and capable of providing protection for the child or children from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.

New York Social Services Law §424. Duties of the child protective service concerning reports of abuse or maltreatment

Each child protective service shall:

1. receive on a twenty-four hour, seven day a week basis all reports of suspected child abuse or maltreatment in accordance with this title, the local plan for the provision of child protective services and the regulations of the commissioner;

2. maintain and keep up-to-date a local child abuse and maltreatment register of all cases reported under this title together with any additional information obtained and a record of the final disposition of the report, including services offered and accepted;

3. upon the receipt of each written report made pursuant to this title, transmit, forthwith, a copy thereof to the state central register of child abuse and maltreatment. In addition, not later than seven days after receipt of the initial report, the child protective service shall send a preliminary written report of the initial investigation, including evaluation and actions taken or contemplated, to the state central register. Follow-up reports shall be made at regular intervals thereafter in a manner and form prescribed by the commissioner by regulation to the end that the state central register is kept fully informed and up-to-date concerning the handling of reports;

4. give telephone notice and forward immediately a copy of reports made pursuant to this title which involve the death of a child to the appropriate district attorney. In addition, a copy of any or all reports made pursuant to this title shall be forwarded immediately by the child protective service to the appropriate district attorney if a prior request in writing for such copies has been made to the service by the district attorney;

5. forward an additional copy of each report to the appropriate duly incorporated society for the prevention of cruelty to children or other duly authorized child protective agency if a prior

request for such copies has been made to the service in writing by the society or agency;

6. upon receipt of such report, commence or cause the appropriate society for the prevention of cruelty to children to commence, within twenty-four hours, an appropriate investigation which shall include an evaluation of the environment of the child named in the report and any other children in the same home and a determination of the risk to such children if they continue to remain in the existing home environment, as well as a determination of the nature, extent, and cause of any condition enumerated in such report, the name, age and condition of other children in the home, and, after seeing to the safety of the child or children, forthwith notify the subjects of the report in writing, of the existence of the report and their rights pursuant to this title in regard to amendment or expungement;

7. determine, within ninety days, whether the report is "indicated" or "unfounded;"

8. take a child into protective custody to protect him from further abuse or maltreatment when appropriate and in accordance with the provisions of the family court act;

9. based on the investigation and evaluation conducted pursuant to this title, offer to the family of any child believed to be suffering from abuse or maltreatment such services for its acceptance or refusal, as appear appropriate for either the child or the family or both; provided, however, that prior to offering such services to a family, explain that it has no legal authority to compel such family to receive said services, but may inform the family of the obligations and authority of the child protective service to petition the family court for a determination that a child is in need of care and protection;

10. in those cases in which an appropriate offer of service is refused and the child protective service determines or if the service for any other appropriate reason determines that the best interests of the child require family court or criminal court action, initiate the appropriate family court proceeding or make a referral to the appropriate district attorney, or both;

11. assist the family court or criminal court during all stages of the court proceeding in accordance with the purposes of this title and the family court act;

12. coordinate, provide or arrange for and monitor, as authorized by the social services law, the family court act and by this title, rehabilitative services for children and their families on a voluntary basis or under a final or intermediate order of the family court.

APPENDIX 4

NEW YORK FAMILY COURT ACT PROVISIONS

New York Family Court Act §611. Permanently neglected child

A "permanently neglected child" is a person under eighteen years of age who is in the care of an authorized agency, either in an institution or in a foster home, and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and

strengthen the parental relationship when such efforts will not be detrimental to the moral and temporal welfare of the child. In the event that the parent defaults after due notice of a proceeding to determine such neglect, such physical and financial ability of such parent may be presumed by the court. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child.

New York Family Court Act §651. Jurisdiction over habeas corpus proceedings and petitions for custody of minors

(a) When referred from the supreme court or county court to the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody of minors.

(b) When initiated in the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, proceedings brought by petition and order to show cause, for the determination of the custody of minors.

New York Family Court Act §1012. Definitions

When used in this article and unless the specific context indicates otherwise:

(a) "Respondent" includes any parent or other person legally responsible for a child's care who is alleged to have abused or neglected such child;

(b) "Child" means any person or persons alleged to have been abused or neglected, whichever the case may be;

(c) "A case involving abuse" means any proceeding under this article in which there are allegations that one or more of the children of, or the legal responsibility of, the respondent are abused children;

(d) "Drug" means any substance defined as a controlled substance in section thirty-three hundred six of the public health law;

(e) "Abused child" means a child less than sixteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(iii) commits, or allows to be committed, a sex offense against such child, as defined in the penal law, provided, however, that the corroboration requirements contained therein shall not apply to proceedings under this article.

(f) "Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; or

(ii) who has been abandoned by his parents or other person legally responsible for his care.

(g) "Person legally responsible" includes the child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.

(h) "Impairment of emotional health" and "impairment of mental or emotional condition" includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.

(i) "Child protective agency" means any duly authorized society for the prevention of cruelty to

New York Family Court Act § 1031(d) Originating proceeding to determine abuse or neglect

(d) A proceeding under this article may be originated by a child protective agency pursuant to section one thousand thirty-two, notwithstanding that the child is in the care and custody of such agency. In such event, the petition shall allege facts sufficient to establish that the return of the child to the care and custody of his parent or other person legally responsible for his care would place the child in imminent danger of becoming an abused or neglected child.

New York Family Court Act § 1033. Access to the court for the purpose of filing a petition

Any person seeking to file a petition at the court's direction, pursuant to subdivision (b) of section one thousand thirty-two shall have access to the court for the purpose of making an ex parte application therefor. Nothing in this section, however, is intended to prevent a family court judge from requiring such person to first report to an appropriate child protective agency.

APPENDIX 5

NEW YORK DOMESTIC RELATIONS LAW PROVISIONS

New York Domestic Relations Law § 110. Who may adopt; effect of article

An adult unmarried person or an adult husband and his adult wife together may adopt another person. An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may

adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social welfare law.

Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such other person.

A proceeding conducted in pursuance of this article shall constitute a judicial proceeding. An order of adoption or abrogation made therein by a surrogate or by a judge shall have the force and effect of and shall be entitled to all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action.

New York Domestic Relations Law § 111. Whose consent required

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

APPENDIX 6

NEW YORK STATE ADMINISTRATIVE
REGULATIONS

New York Codes, Rules and Regulations: Title 18,
Rule 4.7 Records and reports. (a) All authorized
agencies shall:

(1) maintain current case records for each child
in its care, in accordance with the requirements of
section 372 of the Social Services Law, which
records shall be conveniently indexed and retained
until such child becomes 21 years of age; such
record shall also include the intake study, the plan
of service, plan for discharge and aftercare where
applicable, the care and services provided, in-
cluding social, psychiatric and psychological
services, social history of the child and his family,
certification of birth, medical and surgical consent
from parent or guardian, record of school place-
ment, reports from other agencies, all pertinent
correspondence, and periodic progress reports
which shall consist of social information, psycho-
logical or psychiatric reports, if applicable, medical
and dental reports, reports from staff, and after-
care reports;

(2) Maintain a record from which an accurate
roll call of all children in care may be readily
made;

(3) maintain a record of the names, addresses
and dates of visit of every person visiting any child
in care; such names and addresses shall be recorded
at the time of each visit.

(b) All authorized agencies shall submit to the
board reports of admission, transfer and discharge
in accordance with the requirements of section
372 of the Social Services Law. Such reports shall
be submitted for each calendar month on or
before the 10th day of the following month.

(c) A child care agency shall:

(1) report the death of any child in its care
to the board, within 24 hours of such death, on a
form and in accordance with instructions pre-
scribed by the board;

(2) report to the board within 24 hours any
injury to a child in its care which requires the
services of a physician if, in his opinion, such
injury may cause death, serious disability or
disfigurement;

(3) report orally to the board any fire in any
facility operated by such agency which involved a
fire department, which report shall be made
promptly, and then be confirmed by a written
report within 10 days.

18 NEW YORK CODES, RULES AND
REGULATIONS

Rule 450.2. Eligibility and provision of care and
service in child welfare. [Additional statutory
authority: Social Services Law, §§ 153, 350, 409]

(a) Eligibility. The controlling eligibility factor in
child welfare is the need of the child for the care
and protection provided under law. An integral
part of the process of case handling is the
examination, evaluation and application of finan-
cial resources of legally responsible relatives. How-
ever, cases may be accepted for service or care
even though financial need is not present.

(b) Intake. The intake study includes all activity
from the initial contact at the time of application
or referral until a decision is reached as to whether
or not the case will be accepted for care or service
or until a temporary service is completed. There
shall be a record of a purposeful study and
evaluation including:

(1) The date, source, and reason for referral.

(2) Information secured to determine the need for service or care. When expenditure of public funds is anticipated, this shall include exploration of financial resources and determination of residence.

(3) A social diagnosis of the case under study, including the strengths and problems found.

(4) A statement of specific services needed to meet the problems presented by the particular case under study as determined by the diagnosis.

(5) The decision reached, whether acceptance for service or foster care, referral to another agency, or non-acceptance, and the reasons therefor.

(6) A clearly defined plan of care or service to the child and his parents in cases for which the agency accepts ongoing responsibility. The plan shall state clearly the kind and degree of responsibility to be assumed by the parents and by the agency and by any other individuals or agencies that may be involved.

(7) Required documents:

(i) form WS-11, Application for Public Assistance or Request for Care;

(ii) form CW-34, Report of Determination to Waive Investigation or Contribution to Support, when applicable.

(c) Cases accepted for foster care. (1) Placement. For children accepted for foster care, the following information shall be recorded:

(i) date, type and location of placement;

(ii) reasons for particular placement chosen;

(iii) plans for maintaining contact of child with his parents, siblings and/or other relatives, or reasons for not doing so;

(iv) the plan for financial support, including a statement that the parents' responsibility to keep the commissioner informed of any change

in their ability to contribute has been explained to them, as well as the commissioner's responsibility to verify information regarding the parents' resources;

(v) the child's legal status as to custody and guardianship;

(vi) required documents:

(a) written authority to place a child in foster care:

(1) for children received from the Family Court, copy of the court order;

(2) for voluntary placements, a form or statement authorizing placement and signed by the parent or guardian. Form WS-11 may be used or the agency may devise a form for this purpose;

(b) written agreement as to support payments, if applicable, or form CW-34. Such agreements are not applicable if the court has made a support order, or if it has been determined that there is no legally responsible relative who is able to pay toward support, or if there has been a determination to waive contribution to support;

(c) birth certificate or verification of birth;

(d) evidence of religious faith—baptismal certificate or parents' signed statement as to the faith of the child;

(e) consent for routine medical care;

(f) authorization for payment for care (form CW-116, Authorization for Payment for Child Care, is available for this purpose);

(g) form CW-1a, Admission of Child to Foster Care, as report of admission to foster care or as authorization to other child caring agency or institution;

(h) for children to be placed in indirect care, a summary to the agency or institution which is to provide care, covering the child's social and developmental history, factors leading to placement, and future plans.

(2) Supervision, all children except those adjudicated neglected. Supervision shall be provided, either directly or by arrangement with the agency that is providing care, for each child accepted for foster care who has not been adjudicated neglected. In each case there shall be clear and recorded evidence of:

(i) Planned and purposeful visits with child as frequently as necessary in relation to need. Visits with children in direct care* shall take place at least quarterly. These may be made in connection with visits to the foster home, but the need of a child to talk with a caseworker alone must not be overlooked. For children in institutional care, visits with the child will depend on whether or not the public social services agency carries any responsibility for casework with the child.

(ii) Planned and purposeful visits as needed but at least quarterly to foster family homes supervised directly by the public social services agency. In relation to children in indirect care,* visits to the agency or institution providing care as often as necessary for adequate correlation and planning of work with the parents and with the child, but at least once a year.

(iii) Planned and regular contacts with parents where appropriate and possible for the purpose of helping them and the child to make the maximum use of placement, evaluating the continued need for foster care, and providing services designed to make possible the child's return to his own home or other permanent plan when necessary.

*Direct care: care under direct control of the social services district provided in a family home. In New York City, direct care includes group care facilities operated by the Department of Social Services.

*Indirect care: care provided at the request of the social services district in a foster home or group care facility of another authorized agency.

(iv) The reasons for any changes in foster care and any major changes in the case plan.

(v) An annual evaluation and plan in terms of case progress, including work with parents toward return of the child, or other permanent plan, relationship with other relatives, reappraisal of resources, and the child's growth and development. Such reevaluation is necessary to validate continuance of foster care and shall be formally approved by the child welfare supervisor. The plan should state specifically how the child's needs for care, training, and/or treatment are to be met.

(3) Supervision, children adjudicated neglected. Supervision shall be provided, either directly or by an arrangement with the agency which is providing direct care; for each adjudicated neglected child accepted for foster care. In each case, there shall be clear and recorded evidence of:

(i) For children receiving foster care in a foster family home or agency boarding home, planned and purposeful visits with such children by the public or voluntary agency providing the direct care. Such visits shall be made monthly provided, however, that such visits shall be made more frequently as the need therefor may arise and may be made less frequently, but at least quarterly, where the child is making a satisfactory adjustment to the foster home and to his total environment, and the foster home is providing the child with a stable environment, presenting no unusual problems. In addition, for children in a foster family home or agency boarding home of a voluntary agency, visits shall also be made to the agency providing such care as often as may be necessary for adequate correlation and planning of work with the parents and the child, but at least once a year.

(ii) For children receiving foster care in a group care facility, including an institution and group home, planned and purposeful visits with

such children. Such visits with the child or a report or conference in his behalf shall be made monthly. Where the public social services agency provides the casework service to the child, visits with the child shall take place at least quarterly, and in the months the child is not visited, a report from or conference with the group care facility is required. Where casework service is provided by the group care facility, a report from or a conference with such facility is required monthly. In addition, there shall be such contact with the group care facility as is appropriate and necessary to provide for correlation and planning of work with the parent and the child, at least once a year.

(iii) Planned and regular contacts with parents where appropriate and possible for the purpose of helping them and the child to make the maximum use of placement, evaluating the continued need for foster care, and providing services designed to make possible the child's return to his own home or other permanent plan when necessary.

(iv) The reasons for any changes in foster care and any major changes in the case plan.

(v) A semi-annual review and evaluation of all factors in the child's family situation and placement plan to determine whether foster care continues to be necessary, and whether continued care in a group care facility or foster family home or an agency boarding home is the most appropriate plan for the child and, for the child in the FC-ADC program, whether he continues to be eligible therefor. Such reevaluation is necessary to validate continuance of foster care and shall be formally approved by the child welfare supervisor. After a child has continued in care for one year, the review and evaluation shall assure that all possibilities for long-range planning for the child have been explored.

(4) Required documents.

(i) Forms DSS-711, Child's Medical Record, and DSS-704, Medical Report on Mother and Infant, in accordance with department policy and instruction;

(ii) Annual reauthorizations for all children in direct or indirect care for whom payment is made. Reauthorizations may be on an individual or a multiple basis but should be based on reevaluation of the need for care;

(iii) Interim authorizations for payment for any changes, such as change in foster care, change of board rate, change in support agreement, discontinuance of financial support or discharge of child. Form DSS-1046 is available for this purpose;

(iv) For all children in indirect care, notification of changes in the placement of the child as they occur during the year; for children not adjudicated neglected and in indirect care, a written progress report from the voluntary agency or institution at least semi-annually; for children adjudicated neglected referred to in 450.3(c) (3) (i) (sic) and in indirect care a written progress report from the voluntary agency at least semi-annually, and for children adjudicated neglected referred to in 450.3(c) (3)(ii) (sic) such report at least annually;

(v) For children in indirect care, an annual reacceptance, Form DSS-832, Reauthorization to Institution or Agency for Care of Child, to the private agency or institution, based upon an evaluation and decision by the public social services agency of the need for continued care and continued expenditure of public funds;

(vi) Form DSS-547, Transfer or Discharge of Child in Foster Care, for children transferred or discharged from direct care; (see Chapter 1312 of Book 13, State Manual of Policies and Procedures);

(vii) Form DSS-891, Change in Financial Responsibility or Guardianship, to report change of guardianship; (see Chapter 1312 of Book 13);

(viii) For children received from the Family Court, copy of the new court order for any extension of placement.

(5) Discharge from foster care. When a child is discharged from foster care, there shall be clear and recorded evidence of:

(i) the date and reason for discharge;

(ii) the name and relationship of the person to whom discharged;

(iii) the plan for the child, including aftercare supervision if indicated;

(iv) required documents:

(a) for children placed or committed by the Family Court, court order of discharge or other evidence of court approval;

(b) termination of authorization for payment;

(c) form CW-1b for children discharged from direct care;

(d) for children discharged to adoption, copy of the court order of adoption or other written evidence of completion of adoption showing date of the adoption order, the judge and the court, and the date and place of filing;

(e) for children discharged to adoption, form CW-1c reporting change of guardianship through adoption.

(d) Cases accepted for service. Cases accepted for service will include children receiving preventive or protective service in their own homes, children supervised in their own homes after a period of foster care, and mothers of children born out of wedlock for assistance in planning for themselves and their children. For such cases there shall be clear and recorded evidence of:

(1) purposeful contacts as frequently as needed according to plan;

(2) evaluation of progress and need for continued service at appropriate intervals in relation to previous plans, but at least semi-annually;

(3) specific agreement with the public assistance division or with other agencies as to division of responsibility for any case carried cooperatively.

(e) Interagency agreements. There shall be written inter-agency agreements as to policy and procedure between the public agency and those private institutions and agencies which are in continuous use as a placement resource by the public agency. Such agreements must recognize the primary legal responsibility of the public agency for the care of the child which includes the duty of the public welfare commissioner to determine initial and continuing need for care at public expense. A child in the care of a private agency or institution should not be discharged from foster care without the approval of the commissioner of public welfare. There should, of course, be joint consideration of the plan for discharge. The guiding principles in the development of inter-agency agreements should be the need for planned services between the agencies, and the avoidance of duplication of activity. These agreements shall be reviewed at least annually and revised as need for change occurs. Where the public agency uses a private agency or institution only intermittently agreements involving respective activities of the public and private agency may be made on the basis of the individual case accepted for care and shall be in written form.

(f) Compliance with law, rules and regulations. There shall be compliance with law, rules of the State Board of Social Welfare and regulations of the State Department of Social Welfare.

18 NEW YORK CODES, RULES AND REGULATIONS

Rule 606.2. Definitions. As used in this part:

(a) Foster care of children means all activities and functions provided relative to the care of a child away from his home 24 hours per day in a duly licensed or certified facility.

(b) Standards of administration for foster care include the following:

(1) intake (study, summary and information, referral, and assisting and arranging for services to prevent foster care);

(2) placement services (development, implementation, and evaluation of placement service plans);

(3) post-placement services (development and implementation of discharge service plans); and

(4) selection, development and supervision of foster care facilities.

[(a)] (c) Foster child means a person under the age of 18 years, or under the age of 21 years if a student attending a school, college or university or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who is cared for away from his home 24 hours a day in a duly licensed or certified facility.

[(b)] (d) Foster family boarding home means a residence owned, leased or otherwise under the control of a single person or family who have been certified by an authorized agency to care for not more than six children, or is used by a local probation department, the State Department of Mental Hygiene, or the State Division for Youth to care for children, and such person or family receives payment from the agency for the care of such children.

[(c)] (e) Institution means a facility established for the (24-hour) care and maintenance of (26 or

more children) 13 or more children operated by a child care agency.

[(d)] (f) Group residence means (a facility established for the 24-hour) an institution for the care and maintenance of (not less than 13 nor more than 25) not more than 25 children operated by an authorized agency.

[(e)] (g) Group home means a [facility for the care and maintenance of not less than seven nor more than 12 children who are at least five years of age, except that a child placed as part of a sibling group may be under five years, operated by an authorized agency.] family-type home for the care and maintenance of not less than 12 children who are at least five years of age, operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, except that such minimum age shall not be applicable to siblings placed in the same facility nor to children whose mother is placed in the same facility.

[(f)] (h) [Agency-operated boarding home means a facility established for the care and maintenance of not more than six children, except that six siblings may be placed in the same agency-operated boarding home, operated by an authorized agency in quarters or premises owned, leased or otherwise under the control of the agency.] Agency boarding home means a family-type home for the care and maintenance of not more than six children operated by an authorized agency, in quarters or premises owned, leased or otherwise under the control of such agency, except that such a home may provide care for more than six brothers and sisters of the same family.

[(g)] (i) Children who require special foster care services [shall mean] means:

(1) Children who suffer from pronounced physical conditions as a result of which a physician

certifies that the child requires a high degree of physical care, or

(2) Children who are awaiting family court hearings on PINS or juvenile delinquency petitions, or have been adjudicated as a PINS or juvenile delinquents, or

(3) Unmarried expectant mothers, or

(4) Children who are adjudicated as abused or neglected, or are awaiting a family court hearing on an abuse or neglect petition, or

(5) Children who are family-care patients from the Department of Mental Hygiene.

[(h)] (j) Children who require exceptional foster care services [shall mean] means:

(1) Children who require, as certified by a physician, constant 24-hour a day care provided by qualified nurses, or persons closely supervised by qualified nurses or physicians, or

(2) Children who have severe behavior problems characterized by violence towards themselves, other persons or their physical surroundings and who have been certified by qualified psychiatrists as requiring high levels of individual supervision in the home, or

(3) Children who have been diagnosed by qualified psychiatrists as having severe mental illnesses, such as child schizophrenia, severe mental retardation, brain damage, or autism.

Rule 606.6 Foster family boarding home program—payments and State reimbursement.

(a) Each social services district shall establish and submit to the department annually a schedule of rates which it shall pay to foster family boarding homes for foster care service provided to children; however, State reimbursement on payments for such care based upon such rates shall be limited to the maximum provided for in subdivision (b) of this section.

(d) [sic.] State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes up to the maximum levels established by the department based upon data published by the U.S. Bureau of Labor Statistics, and other generally accepted sources, relating to the cost of raising a child in a family of four with a moderate standard of living.

(c) In the case of children who require special foster care services, State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes. However, in no case shall reimbursement be made on payments that exceed one-third of the average, as established by the department, of the Statewide cost of institutional care provided by authorized agencies.

(d) In the case of children who require exceptional foster care services, State reimbursement shall be made only on actual payments to certified foster parents providing care for children in foster family boarding homes. However, in no case shall State reimbursement be made on payments that exceed one-half the average Statewide cost, as established by the department, of institutional care provided by authorized agencies, or, where the child cannot be cared for in such institutions, one-half the average cost of the hospital or nursing home care which would be necessary if foster care were not provided.

(e) Where certified foster parents are providing care for a child in a foster family boarding home on October 1, 1974 and are receiving payment for such care in excess of the maximum level of payment approved by the department for the type of care provided, State reimbursement shall continue to be made on the excess payment for so long as the child continues to receive care in that foster family boarding home.

(f) State reimbursement through the Department of Social Services shall not be available for foster care or for bed reservations in any foster family boarding home during any period in which a child is being held therein for detention as defined in a section 510-a of the Executive Law.

Rule 606.12 Maintenance of case records. A case record shall be maintained for each child who received any foster care services as a public charge, and who has not been placed directly in a foster care facility by a court. Each such record shall document compliance with the applicable provisions of this part. Official documents, required forms and reports and other essential data including, but not limited to birth, religion, health, finances, and court orders shall be included in the record.

Rule 606.13 Eligibility. The only eligibility factor for foster care and foster care services is the need of the child for care and protection.

Rule 606.14 Intake.

(a) An intake study to determine the need for foster care shall be conducted for each child with respect to whom the local department has received a referral or an application for foster care services. This study, which includes all activity from the time of that application or referral until a decision is reached as to whether the case will be accepted for foster care or other service or assistance or until a temporary service is completed, shall continue until the relevant data required in subdivision (b) of this section is in as adequate form as possible, but in no case for more than 90 days. When expenditures of public funds is anticipated, the study shall include exploration of financial resources and determination of residence.

(b) While the intake study is being conducted, a summary thereof shall be prepared. (1) Within 30 days after the intake study is begun, a preliminary summary shall be made detailing the activities which have occurred, which shall include, but shall not necessarily be limited to:

(i) the specific and immediate problems which appear to require replacement.

(ii) the underlying relationship patterns within the family.

(iii) the strengths in the child and his family.

(iv) the possibilities for stabilizing the family situation in order to obviate the need for placement.

(v) identification of the assistance or services, which, if provided, could reasonably be expected to obviate the need for placement.

(vi) an estimate of whether the preferred services or assistance are available, and how they can best be provided.

(vii) an alternative plan if the preferred assistance or services be provided.

(viii) an estimate of the amount of time required to ameliorate the conditions leading to the need for placement.

(ix) a determination as to whether the child can be left with the family in reasonable safety while efforts are made to correct the problem.

(x) if placement is necessary, a statement as to the kind of placement indicated and how it is to be accomplished.

(xi) names and dates of all contacts.

(2) Upon completion of the intake study, a final summary shall be made, which shall set forth, in detail, the information required in paragraph (1) of this subdivision, and shall conclude with a decision to:

(i) close the case as not in need of further service,

(ii) transfer the case to another agency or unit which will provide assistance or services other than foster care, or

(iii) accept the child into foster care.

(c) Information, referral, and assisting and arranging for services to prevent foster care. During the Intake Study, the local department, in order to enable the family to remain together by obviating the need for foster care, shall provide each family with:

(1) a full explanation of foster care services, including the respective obligations of parents and agencies;

(2) information about other services or assistance which may be alternatives to placement;

(3) assistance in applying for services for which they are eligible, and ascertaining whether those services are being provided;

(4) counseling; and

(5) referral for and help on obtaining assistance and services from other agencies and other units within the local department.

Rule 606.15 Placement Service Plan.

(a) A clearly defined placement service plan shall be recorded in the local social services district's case record. A tentative plan outlining immediate action to be taken must be completed at the conclusion of the intake study, with additions of intermediate and long-term goals and changes in the plan recorded as appropriate, including at least a semi-annual evaluation. The service plan shall include:

(1) special, time-limited, realistic goals. Goals shall be defined on three levels: short-term, intermediate, and long-term. (i) Short-term goals should be established for no more than a three-month

period. The most urgent problems are to be identified, steps to be taken to meet them outlined, and a time established for achieving the goal.

(ii) Intermediate goals involved tasks and activities which can be expected to be achieved within no more than a six-month period.

(iii) By at least the end of one year, a long-term goal must be established. The long-term goal shall be either return of the child to relatives, placement for adoption, providing appropriate care for the period necessary to assist the child to achieve independent living, or if he is in need of continued care beyond his minority, arranging for his transfer to a suitable agency. Plans for maintaining familial contact or reasons for not doing so shall be specified.

(2) identification of the services required by both the child and his family. Where needed services are not available, the reasons why shall be stated, and a description given of the services which will actually be provided.

(3) description of the methods through which the needed services are to be provided, including the type and location of placement. Responsibilities of agency, parents, and any other persons or agencies involved shall be clearly described.

(4) the plan for financial support, including a statement that the parents' responsibility for keeping the commissioner informed of any change in their ability to contribute and the commissioner's responsibility to verify information regarding the parents' resources has been explained to them.

(b) The case record shall set forth the specific steps which are taken to implement the service plan. It shall be shown that the child is receiving adequate supervision in his placement and that the child and family are receiving those services which are judged to be necessary to make possible a

permanent plan for the child. The following services shall be provided:

(1) Within the first two weeks of placement:

(i) Parents shall be contacted (unless it is documented that they are not available) to determine their current situation and their reaction to the child's placement; services, including at least counseling services, shall be offered to assist them in correcting the conditions leading to placement and to participate in the child's placement.

(ii) Arrangements shall be made for frequent contact between parents, other relatives and the child, unless compelling reasons are recorded why such contact is not possible or desirable, such as when a surrender is contemplated and the parent does not wish to maintain contact. Dates of contact shall be recorded.

(iii) The child shall be interviewed or visited to determine his reaction to separation and his adjustment to the foster care placement; arrangements shall be made for any services necessary to meet his needs, such as psychiatric care or special education.

(iv) The social worker assigned to the child's case shall obtain information as to the child's adjustment through personal contacts with those immediately responsible for his day-to-day care.

(3) During the first three months of placement:

(i) Counseling interviews shall be held with the family at least every two weeks, unless compelling reasons are recorded why such contacts are not possible or desirable.

(ii) The child shall be interviewed or visited every two weeks, unless compelling reasons are recorded why such contacts are not possible or desirable. In no case shall visits be made less frequently than every three months.

(iii) The social worker assigned to the child's case shall obtain information as to the child's adjustment at least every two weeks through personal contacts with those immediately responsible for his day-to-day care.

(iv) Arrangement shall be made for the provision of other services called for by the placement service plan.

(3) During the fourth through twelfth month:

(i) Contacts shall be made with the family as needed to execute the plan of service, but in no case less than monthly without documented reasons.

(ii) The child shall be interviewed or visited at least monthly unless compelling reasons are recorded why such contacts are not possible or desirable.

(iii) The social worker assigned to the child's case shall obtain information as to the child's adjustment through personal contacts with those immediately responsible for his day-to-day care as indicated by the service plan, but in no case less frequently than every three months.

(4) Following the first year of placement: the placement service plan shall be re-evaluated, as provided in subdivision (c) of this section.

(5) Counseling services to the child and family shall continue during the following 12 months as indicated by the placement service plan. Other services shall, if appropriate, continue as well. There shall be monthly contacts with the child and at least quarterly contact with those immediately responsible for his day-to-day care.

(6) During subsequent years of placement contacts must be made as required by the placement service plan, but in no case shall contacts with the child and those immediately responsible for his day-to-day care occur less than quarterly.

(7) Visits shall be made to all agencies from which care is purchased as frequently as necessary for adequate correlation and planning of work with the parents and child, but at least once a year.

(c) All adjustments in the service plan are to be recorded as they occur. (1) A re-evaluation of the plan shall be recorded as six-month intervals. The six-month evaluation must include:

(i) the establishment of new or additional goals, if applicable.

(ii) a summary of the services provided and their effect upon the case situation, and

(iii) a redetermination of the need for continued foster care.

(2) Payment for care shall be authorized annually.

(3) By the end of the first year, the long-term goal should be clearly delineated and the steps necessary for its attainment clearly specified.

Rule 606.16 Discharge service plan. (a) When it is determined that within the next six months, a child is to be returned to relatives, placed for adoption, helped to make arrangements for independent living, or discharged to an agency which will be responsible for his continued care, a discharge service plan shall be developed. The plan shall clearly state to whom the child is to be discharged, where responsibility for the child will lie, what services are to be provided prior to and following discharge and how they are to be provided.

(b) Implementation of the discharge service plan begins prior to the time of discharge with interviews with the child, his family, and other individuals or agencies involved in the plan to identify possible problems, evaluate the readiness of all parties to participate in the plan, and arrange for

the services identified in the discharge service plan. It shall include arranging for the physical transfer of the child, and for a period of not more than six months in those cases where a child is discharged to relatives or his own responsibility, shall also include (1) providing or arranging for services specified in the discharge service plan, (2) maintaining contact with or supervision over the child or his family, and (3) providing counseling to the child or family in order to prevent the need for replacement.

Rule 606.17 Purchase-of-service agreements. Each purchase-of-service agreement for foster care executed by a local social services department shall require the authorized agency to provide services as defined and required in this part and to maintain records and submit reports in the manner and form required by the local social services department.

Rule 606.18 Implementation. By September 1, 1976, each social services district shall submit a plan for an orderly implementation of these regulations. This plan may extend over the next two years, but shall provide for full implementation of the regulations by January 1, 1979.

If a local social services district wishes to postpone full implementation of the required schedule of visitation during the first two years of placement (606.16(b)(1)-(5)) because fiscal restraints prevent the appointment of adequate staff, it may appeal to the Department for an exception. The following information shall be provided in such a request for exception:

(a) the casework staff assigned to the supervision of children in foster care and the caseloads carried by those workers,

(b) the estimated number of additional staff needed to comply with the visiting schedule as outlined in 606.15,

(c) the schedule of visits which is currently maintained for both the child and the family during

(1) the first 3 months of placement

(2) the subsequent 21 months of placement

(d) the steps which the agency is taking to assure that appropriate services are being provided to all children in care and for their families as indicated.

Within 20 working days of receiving such an appeal, the Department shall notify the district that

(a) the appeal is approved for a period of time not to exceed 2 years,

(b) the appeal is approved, subject to certain conditions which the Department shall specify, or

(c) the appeal is denied and the district must implement the regulations.

Section 450.2 is hereby repealed.

APPENDIX 7

NEW YORK CITY ADMINISTRATIVE PROCEDURES

PROCEDURE FOR REMOVAL OF CHILDREN FROM FOSTER FAMILY CARE

August 5, 1974

TO: Executive Directors, Voluntary
Child Caring Agencies

FROM: Carol J. Parry, Assistant
Administrator Special Services
for Children

SUBJECT: Removal of Children From
Foster Family Care
SSC Procedure No. 5 —
August 5, 1974

Enclosed are copies of the above named procedure which required the use of a new Exp. Form FC-6.

You will note that the model Exp. Form FC-6 bears the letterhead of Special Services for Children. Each agency should use the identical text on its own letterhead in accordance with the procedure.

Enc. (2)

**THE CITY OF NEW YORK—HUMAN
RESOURCES ADMINISTRATION**

**DEPARTMENT OF SOCIAL SERVICES —
SPECIAL SERVICES FOR CHILDREN**

**SUBJECT: REMOVAL OF
CHILDREN FROM FOSTER
FAMILY CARE**

**SSC PROCEDURE
NO. 5**

**TO: Executive Directors, August 5, 1974
Voluntary Child
Caring Agencies
Staff, Special Services
for Children**

I. INTRODUCTION

In recognition that there are considerations of due process which should be protected in removal of children from foster family homes, and at the same time bearing in mind that the Commissioner of Social Services has the duty and responsibility to provide care and services for children who are public charges which are in their best interests, the following procedural changes within the framework of Social Services Law Section 400 and SDSS Regulation 450.14 are to be instituted prior to the removal of a child from a foster home. *These changes do not apply when a child is being discharged to his own family home, in which case*

the procedural instructions outlined in Appendix A, attached, shall be followed. They also do not apply when the health and safety of a child are endangered. In such a case the child should be removed immediately. The instructions below, which provide for an Agency Conference and an SSC Independent Review, *do* apply to children in both Voluntary Agency or SSC Directly Operated Programs who have been placed in boarding homes under a plan for long-term care, or who have remained in shelter boarding homes for a period of one year or more, and are relevant to situations where a child is being transferred to another boarding home, to another child care facility, or to an adoptive home.

II. DETAILED INSTRUCTIONS

A. Notice of Intention to Remove a Child From a Foster Home

1. Sound casework practice should include home visits with foster parents whenever removal of a foster child from their home is being considered. In such visits the reasons for the plan should be interpreted to the foster parents so that they be afforded an opportunity to discuss the situation and cooperate in carrying out the plan. Such visits and discussions should take place as early as possible so that both the foster parents and children may be well prepared for any change.
2. If the ultimate casework decision is to proceed toward removal of the child from the foster home in situations where the imminent health and/or safety of the child is not involved, or where removal is *not* for the purpose of returning the child to his own family home, the Voluntary Agency caseworker shall

prepare a Notice of Intention to remove a Child from a Foster Home, Form Exp. FC-6, quintuplicate; the SSC case worker shall prepare the form Exp. FC-6, in quadruplicate.

3. If the foster parents are being formally advised during a home visit of the decision to remove the child, the caseworker should have available the above prepared Form Exp. FC-6 with the reasons for the decision stated thereon. After discussion and interpretation, which include the alternatives of an Agency Conference and/or Independent Review to which he is entitled, the worker shall provide the foster parents with a dated original and one copy of the Form.
4. The foster parents should be informed of the need to express their reaction to the plan for removal of the child by checking the appropriate boxes on the Form Exp. FC-6, which can then be returned to the caseworker at the time of the visit. Upon return to the office, an SSC caseworker will date the third and fourth copies of Form Exp. FC-6, filing the third copy in the case record and, if the foster parents are not in agreement with the plan, forward the fourth copy to the SSC Independent Review Team Supervisor. A Voluntary Agency caseworker will similarly date his third, fourth, and fifth copies and forward the third copy to the SSC IARP Team, and if the foster parents do not accept the plan, forward the fourth copy to the SSC Independent Review Team Supervisor, and file the fifth copy in the agency case record.
5. If the foster parents have no objection to the removal of the child, the caseworker shall request them to execute the waiver on Form Exp. FC-6 and discuss with them arrangements for removal of the child. The Voluntary Agency should forward one

copy of the Form to the IARP Team, a second copy to the SSC Independent Review Supervisor.

6. If the foster parents do not wish to execute the waiver and/or oppose the removal of the child from their home, the caseworker shall explain the processes of the Agency Conference and Independent Review options available to them, as well as their option to subsequently execute the waiver at any stage of the Agency Conference and/or Independent Review, and impress upon them the urgency of making immediate arrangements for the scheduling of such a Conference and/or Independent Review. An Agency Conference, if desired, must be held within *5 days* of the date of the Notice on Form Exp. FC-6. The foster parents should therefore be helped to state their request or to complete the appropriate boxes on the Form at the time of the caseworker's visit and delivery of the Form to them. If they are unwilling or unable to do this at that time, they should be advised to telephone the caseworker within 48 hours of the date of the Notice if they wish an Agency Conference, in view of the narrow time frame involved. An Independent Review must be requested within *10 days* from the date of their request for one. The foster parents should be advised that the time frames above will be strictly adhered to.
7. If the foster parents indicate that they wish to request an Agency Conference and/or Independent Review at the time of the caseworker's visit, their complete copy of the Notice on Form Exp. FC-6 should be accepted from them. If they are requesting an Independent Review at that time, or may request it later, they must be advised to make the required telephone request to the SSC Independent Review Supervisor within 10 days of the date of the Notice on Form Exp. FC-6.

8. If for any sound reason the notification of the decision for removal is not delivered during the course of a home visit, the prepared original and the copy of Form Exp. FC-6 shall be mailed to the foster parents, dated as of the date of mailing.
9. At any stage of the foregoing procedure, the foster parents may give an informed written waiver of their right to an Agency Conference and/or Independent Review and return the child to the Voluntary Agency or SSC Direct Care Program.

B. The Agency Conference

1. When indicated during the home visit, or following the receipt of a phone call from the foster parents requesting an Agency Conference, the SSC or Voluntary Agency caseworker or supervisor shall advise the foster parents of the time and place of the Conference, that the purpose of the Conference is to review the basis for the decision with the foster parents only, and that no other representative will be allowed to attend. The date of the Conference shall be set within five days of the date of the notice on Form Exp. FC-6 to the foster parents.
2. The conduct of the Conference shall be held in accordance with casework principles and concepts, (as distinct from the legal concept of "due process" which applies in the Independent Review), with the foster parents given full opportunity to express their objections to the removal of the child and the reasons therefore. A complete summary of the Conference shall be entered in the case record with a Voluntary Agency preparing a copy for forwarding to the SSC IARP Team, and another copy for presentation at the time of the hearing should an Independent Review also be requested.

C. The Independent Review

1. Upon receipt of a phone call from the foster parents by the Independent Review Supervisor requesting an Independent Review, the Supervisor shall determine if a Conference at the Agency had been requested and if the foster parents intend to be represented at the Review. An Independent Review must be requested within 10 days of the Notice on Form Exp. FC-6 and be scheduled within 10 days of the date of the request by the foster parents. The Independent Review Supervisor shall notify the SSC Direct Care Unit, or the Voluntary Agency and the appropriate IARP Team of the date and time of the scheduled hearing and request they be present and be prepared to present their position and any supporting evidence. A copy of the dated notice on Form Exp. FC-6 returned by the foster parents shall be delivered to the Independent Review Supervisor within 48 hours. If the foster parents indicate their intention to be represented by Counsel, the Independent Review Supervisor shall advise the HRA Office of Legal Affairs in writing of the time and place of the Review so that Counsel may participate. If two agencies are involved, one the agency carrying family case planning responsibility, the other the agency providing the foster care to the child, both must be included and participate in the planning and decision.
2. The Independent Review shall be conducted by the Independent Review Officer of SSC in accordance with the concepts of due process, in that:
 - a. The Review shall be heard before an SSC official on a supervisory level who has had no previous involvement with the decision to remove the child. (The only information appropriate for the Reviewer to possess prior to the conduct of the

Review is a copy of Form Exp. FC-6, Notice of Intention to Remove a Child from a Foster Home, given to the foster parents, including the basis for the foster parents' objections thereon, and the date of the scheduled hearing);

- b. The foster parents may be represented by Counsel and have the right to present witnesses and other evidence on their behalf;
 - c. The SSC Direct Care Unit or the Voluntary Agency and the appropriate IARP Team, as the case may be, shall be present, have the right to present testimony and evidence in support of their decision to remove the child, and be represented by Counsel;
 - d. Witnesses may be cross-examined, and all evidence presented is subject to review by all parties;
 - e. There shall be a tape recording or stenographic record of the Review and the foster parents shall be entitled to a copy or transcript thereof, upon request and payment of the cost for duplication;
 - f. The Reviewer shall render a *written* decision within five work days after the Review setting forth the decision and the reasons therefore, and shall advise the foster parents of their right to a State Fair Hearing;
 - g. The decision in writing shall be mailed to the foster parents and to their Counsel if they are so represented.
3. All persons other than the parties (foster parents, SSC Direct Care Program worker and supervisor, Voluntary Agency worker and supervisor, and IARP Team representative) and their Counsels shall be excluded from the Review Room unless giving testimony. All witnesses shall be sworn, except that parties may stipulate that the testimony is deemed as being given under oath.

4. The SSC Direct Care Program representative, Voluntary Agency representative, or SSC IARP representative shall present their case in support of the removal of the child from the foster home first. The foster parents shall thereafter present their case in support of their objection to this decision. All witnesses shall be subject to cross-examination. *If any portion of, or report contained in, a case record is to be used in support of the case for removal of the child, the Reviewer is required to allow the Counsel for the foster parents to also review such report or portion of the case record.* Copies of this documentation or evidence should be duplicated for presentation to the Independent Review Supervisor.
5. Within five days after the completion of the Independent Review, the Reviewer shall render a written decision based upon the evidence and testimony received at the Review, whether to affirm the decision to remove the child, or to disapprove such removal. The decision shall set forth the facts relied upon in reaching such decision, and if the decision is to affirm the removal of the child shall advise the foster parents of their right to request a State Fair Hearing pursuant to Section 400 of the Social Services Law. Copies of the Independent Review decision shall be forwarded to the Directors of the Bureau of Child Welfare and the SSC IARP Program. The decision of the SSC Independent Review Supervisor is binding on the Child Caring Agency.
6. The Independent Reviewer shall also mail copies of the written decision to the foster parents and their Counsel if represented, as well as to the SSC Direct Care Program and/or Voluntary Agency and IARP Team. In addition, the Reviewer may, if so desired, elect to notify the parties by telephone.
7. If the Independent Reviewer affirms the decision to remove the child from the foster home, the child

shall not be removed for at least three days after written notice of the written decision is mailed to the foster parents, or prior to a proposed effective date of removal, whichever occurs later.

TO:

Date:

Notice of Intention
To Remove A Child
From A Foster Home.

Dear

The care and attention you have given to foster child(ren) in your home is greatly appreciated. This has been a service not only to the child(ren) but to the entire community. To continue to plan for

we now consider it in (his) (her) (their) best interest(s)
to leave your home on or about (date)

The plan for the child(ren) is to:

☐ place (him) (her) (them) in another foster home or
other appropriate facility because _____

☐ place (him) (her) (them) in an adoptive home
because _____

If you have no objection to the removal of the child(ren) from your home, please indicate this by signing the waiver on page two and return it to your caseworker immediately.

However, if you have any objection to the removal of the child(ren) from your home, you may request an Agency Conference with your caseworker and supervisor, which shall be held within five (5) days from the date of this notice, at which time you may present your reasons for objecting to the child(ren)'s replacement. Please telephone immediately if you desire such a conference. Indicate your objections by checking the appropriate box on the reverse page, and return it to your caseworker.

You may also request an Independent Review within ten (10) days of the date of this notice, in addition to or instead of the Agency Conference. This Independent Review will be held at the Department of Social Services, Special Services for Children office within ten (10) days from the date of your request, at which time you may be represented by an attorney or other representative and present witnesses and other information you consider important. You also will be able to question the Agency's witnesses. Please call _____, SSC Independent Review Team Supervisor, at _____ immediately, if you desire such a review and state whether you expect to be represented. You should also indicate your objection below and check the appropriate box on this letter and return it to your caseworker.

If we do not hear from you within ten (10) days, we will assume that you have accepted the plan and proceed with the child(ren)'s replacement.

Very Truly yours,

Caseworker

- ☐ I have no objections to the removal of the foster child(ren) from my home and agree to return the child(ren) to the Agency.
- ☐ I object to the removal of the child(ren) from my house because

- ☐ I desire a conference with my caseworker and supervisor.
- ☐ I desire both a conference and independent review.
- ☐ I desire an independent review instead of a conference.
- ☐ I expect to have a representative present at the review.

Dated: _____ Foster Parent(s) _____

PLEASE NOTE: IF YOU OBJECT TO REMOVAL OF THE CHILD(REN) FROM YOUR HOME, YOU ARE ENTITLED TO A STATE FAIR HEARING, IN ADDITION TO THE AGENCY CONFERENCE AND INDEPENDENT REVIEW. HOWEVER, THE CHILD(REN) MAY BE REMOVED FROM YOUR HOME, FOLLOWING THE INDEPENDENT REVIEW, IF THAT IS THE INDEPENDENT SUPERVISOR'S DECISION.

Exp. Form FC-6
Aug., 1974

**THE CITY OF NEW YORK –
HUMAN RESOURCES ADMINISTRATION
DEPARTMENT OF SOCIAL SERVICES –
SPECIAL SERVICES FOR CHILDREN**

SSC PROCEDURE NO. 21

February 18, 1976

SUBJECT: VOLUNTARY PLACEMENT AGREEMENTS

TO: Executive Directors,
Voluntary Child Care Agencies
Staff, Special Services for Children

FROM: Carol J. Parry,
Assistant Commissioner
Special Services for Children

I. INTRODUCTION

The purpose of this procedure is to present new criteria and guidelines for accepting Voluntary Placement Agreements from parents or guardians and to introduce concomitantly a revised more relevant Agreement Form W-864 (11/13/75) to comply with the requirements of the new Section 384a of the Social Services Law.

Special Services for Children had been concerned for some time over the content of its Placement Agreements and the manner by which they were being obtained. Despite a number of revisions of the form, it had never completely kept pace with the increasing recognition by the various Courts and the professional child welfare field of the rights of parents and children in foster care. The enactment of Chapter 710 of the Laws of 1975 by the New York State Legislature amended various relevant sections of the Social Services Law and now makes it necessary for SSC to immediately modify its practice and Placement Agreement to conform with the new mandates, as well as to be more compatible with current child welfare philosophy. (See memorandum of October 15, 1975 on "Critical Changes Affecting Voluntary Placement (W-864) of Children in Foster Care" from Carol J. Parry to Voluntary Agencies and SSC Staff.) A Task Force of SSC operational and administrative staff evaluated a number of Placement Agreements used by other communities; prepared, discussed, and revised a number of draft forms; and finally developed the attached Form W-864 (Rev. 11/13/75) as most suitable for our use.

The format is that of a contract between the Commissioner and the parents or guardian of a child in which permission is given to the Commissioner to place

the child. It stresses the mutual and differential responsibilities carried by both in the foster care process. It removes the reference in the previous agreement to the parents' inadequacy to carry out the parental role, phraseology that was so difficult for many parents to accept and often an obstacle to obtaining an Agreement. It emphasizes the parents' right to have the child returned to them upon written request, unless contrary to a Court Order. It eliminates the "waiver clause" (Item 4) which was frequently ignored by most judges because of its dubious constitutionality. It moves the reference to a possible consequence of a permanent neglect finding in the event of irregular contacts or failure to support when able (Item 2), from the body of the Agreement, (implying consent by the contracting parties, when actually it is a statement of the law) to a less threatening context of an appending informational "Note" on the Form. It provides for an adjunct informational pamphlet, "The Parents' Handbook," to accompany the parents' copy of the Agreement, to confirm the content of the caseworker's discussion with them about the meaning, rights and obligations involved in the foster care process, and to be available to them for future reference. The parents are also given a copy of Form W-864V, "Request for Discharge of Child From Foster Care," as a convenient mechanism upon which to make their written request for such purpose when they are ready and so desire to use this form.

II. HIGHLIGHTS OF NEW SECTION 384a SSL IN CHAPTER 710

1. *Only parents and legal guardians* can enter into voluntary placement agreements—on or after November 7, 1975 such an agreement cannot be accepted from a relative within the second degree or any other

person even if that person has the physical custody of the child.

2. A child placed under a Voluntary Placement Agreement taken *on or after November 7, 1975* must be returned to the parents or legal guardian within ten days of the receipt of a request for discharge in writing or in person, unless a Court order secured by SSC and/or a voluntary agency permits retention of custody.
3. Because of the implications of Item 2 above, a Voluntary Placement Agreement should not be taken where there is any indication of actual abuse or neglect. Where this determination cannot be made clearly, or cannot be sufficiently supported for a court procedure, a Voluntary Placement Agreement may be taken. However, it should be borne in mind that such a child would have to be discharged within 10 days of a parent's request. Such situations must be highlighted for the agency which will accept the child for care so that the family situation may be closely monitored for the proper protection of the child in the event a request for discharge is made in the future.
4. When a child living with relatives or unrelated persons is found to need placement, it is necessary to locate the parent or legal guardian to obtain their Voluntary Agreement as the Family Court will not accept "Petition for Custody" in this situation under the current statute; nor will the Court entertain a Section 358a Petition where a Voluntary Agreement is signed by other than a parent or legal guardian. New legislation is being proposed in the 1975 Legislative Session to remedy the above situation.

III. GENERAL INSTRUCTIONS

A. Possible Child Abuse or Neglect Situations

1. A planning caseworker shall not accept a Form W-864, Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect; regardless of whether the situation came to SSC's attention through a report to the Central Registry, by other source of referral, or by personal application; and, even if the parent or guardian desires removal of the child from the home and is willing to sign a Voluntary Agreement. If such a situation has not already been reported to the Central Registry, the caseworker shall make a report immediately.
2. Where the completion of the diagnostic study finds that child abuse or neglect is "indicated," the caseworker shall consider the advisability of immediate removal of the child or children from the home where the child is in danger, and if advisable and necessary, immediately initiate proceedings in the Family Court in accordance with existing SSC Procedure No. 3.
3. Where the determination of abuse or neglect cannot be made clearly, or cannot be sufficiently supported for a Court proceeding, Form W-864 may be taken from the parent or guardian. However, such situations must be highlighted for the agency in which the child will be placed so that the family situation can be closely monitored for the proper protection of the child in the event a request for discharge is made in the future.
4. When a study indicates the need for placement, and there is no parent or legal guardian available from whom to obtain a Voluntary Placement Agreement, careful consideration must be given to the possibility of initiating a neglect or abandonment petition

against the absent parent in the Family Court as the basis for effecting the placement. Should the DSS Office of Legal Affairs inform us that the current circumstances could not support such a petition, it will be necessary (at this time until the legislation is amended) to proceed with the placement of the child under the Commissioner's responsibilities, powers, and duties as given him in Sections 395 and 398 of the Social Services Law, for the protection and care of the child.

B. Non-Child Abuse or Neglect Situations

Where the diagnostic study determines that foster care is the best plan for a child, and a parent or guardian is available and in agreement with such a plan, the planning caseworker shall:

1. Present the W-864 to the parent to be carefully read. Spanish speaking parents should be informed of the Spanish version on the reverse side of the form and be assured that it is a true equivalent of the English version.
2. The caseworker should explain the agreement as resembling a contract which delineates the respective responsibilities to be carried by both the Commissioner and the parents while the child is in care so that the experience can be the most constructive possible for both the parents and the child.
3. It is important that the agreement be discussed with the parents, paragraph by paragraph, to insure that the parents are informed of and understand their responsibilities and rights. This is particularly essential when a parent cannot read well or is not well versed in either English or Spanish. This discussion should emphasize:
 - a. the parents' right, responsibility, and need to participate with the agency in the planning for the child so that he may be able to be returned home

as early as possible or perhaps moved to a permanent home;

- b. that regular visiting and communication with the child is important both to the child and the parents and in regard to the child's adjustment in care and the planning for him. (See SSC memorandum of September 16, 1975 to Voluntary Agencies and SSC Staff, "Policy Statement on Parental Visiting");
- c. that the parent has an obligation to contribute to the cost of foster care in accordance with their ability as determined by SSC Procedure No. 1. This requires that the parents keep the agency always informed of the current place of employment, changes in income, and living arrangements;
- d. that it is important for the agency to be always kept informed of the parents' whereabouts so that they may always be reached when needed for purposes of planning, medical emergencies, etc.;
- e. that the parents understand that they are agreeing to the administration of routine medical treatment, but they will always be consulted whenever serious medical procedures or surgery may be required, and that they are authorizing the Commissioner to consent to such emergency procedures or surgery if for any reason they are unavailable for such consultation;
- f. that the parents have the right to have the child returned home within a specific time limit upon written request, unless this would be contrary to the obtainment of a Court order. The parents should be advised that they are receiving a copy of Form W-864V, Request for Discharge, which will be attached to their copy of the Agreement and available for their use when ready to make their written request. It should be explained that a request for discharge must not necessarily be made on this form, but can also be made in person. However, the form is a very convenient method

for them to make their request and asks, the information that is needed from them. Additional copies of the form can always be obtained from SSC upon their request;

- g. that if the parents have any complaint about the care and services provided, this should be discussed with the agency and that the "Parents' Handbook" (see Item 4, below) gives instructions as to how this can be done.
- 4. The parents shall be given a copy of the "Parents' Handbook." The caseworker should use this Handbook as an adjunct resource for the explanation of the Agreement to the parents. They should understand that the Handbook clarifies the content of the Agreement which can be reviewed by them at any time in the future for renewed understanding of their rights and responsibilities or to obtain information about what to do about any problems they may have.
- 5. The caseworker should also bring to attention the "Additional Information" section appended to the Agreement and interpret the meaning that the statutory provisions could have to them. They should also be advised that the Handbook provides a fuller discussion of this, and of other Court procedures that may be relevant to their particular situation.
- 6. The parents should be encouraged to raise any questions they may have so that clarification can be given at this point in time. When all questions have been clarified sufficiently and the caseworker is satisfied that the parents are aware of the meaning of the Agreement for them, they should be asked to sign Form W-864 appropriately completed, in quadruplicate, one set for each child for whom foster care is being recommended. The caseworker taking the Agreement shall then sign each copy of the form as witness to the parents' signatures. The fourth copy of the Agreement shall have attached to it a Form W-864V, "Request for Discharge of Child from

Foster Care" and be given to the parent with a copy of the "Parents' Handbook." The remaining three copies shall be filed in the case record, the original copy to remain in the record, the other two to be available for processing when needed.

A Voluntary Agency taking an Agreement for the "additional commitment" of siblings of a child in care may elect to prepare the Agreement in quintuplicate, retaining the fifth copy for their record and forwarding the original and two copies to its SSC Accountability Team.

- 7. Where a study of a child living with relatives or unrelated persons determines need for placement, but no parent or legal guardian is available from whom to obtain a Voluntary Placement Agreement, under current statute it is not now possible to enter into such an agreement from the persons having physical custody. Neither is it possible for the Court in such situations to accept a "Petition for Custody" from the Commissioner under the present Family Court Act unless there is provable evidence of neglect or abandonment (see Item A, 4). If there is no basis for a neglect or abandonment action against the parent, and/or where in the opinion of the DSS Office of Legal Affairs a wait of six months would be necessary to establish abandonment, if immediate foster care is indicated, and until the legislation is amended, it will be necessary for SSC to proceed with the placement for the protection of the child, under the Commissioner's responsibilities, powers, and duties assigned in Sections 395 and 398 of the Social Services Law. When a child is placed under such circumstances, it is important that the planning unit and/or child caring agency immediately institute and maintain diligent efforts to locate the missing parent and obtain from them the Voluntary Placement Agreement, if found. If all efforts to locate the parents prove unsuccessful, the planning unit shall

consider the bringing of an applicable court proceeding (abandonment, permanent neglect), to enable appropriate planning for the child as indicated.

Form W-864
Rev. 11/13/75

THE CITY OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
SPECIAL SERVICES FOR CHILDREN

VOLUNTARY PLACEMENT AGREEMENT
(Prepare in Quadruplicate)

Case No. _____

I (we) _____

residing at _____

House No. and Street Apt. No. or C/O

Borough or P.O. _____ Zip _____

parent(s) (legal guardian) of _____,

born on _____,

request the Commissioner of Social Services to accept care and custody of my (our) child.

I (We) grant permission to the Commissioner to place my (our) child in a child care setting that he determines to be suitable for my (our) child's care.

I (We) understand that I (we) and the agency with which my (our) child is placed are expected to work cooperatively towards planning for the future of my (our) child, and that the agency will offer whatever help is available to enable me (us) to decide what is best for my (our) child. I (We) understand that it is my (our) right and responsibility to plan with the agency

towards my (our) child's early return home or to actively participate in making alternate plans so that he or she can have the benefit of another permanent home.

I (We) understand that when I (we) want my (our) child discharged from foster care I (we) will request return of my (our) child by giving written notice to the agency caring for my (our) child. A copy of a "Request for Discharge of Child from Foster Care" form is attached to this agreement for my (our) use. The agency must either return my (our) child to me (us) on the date that I (we) request, or within ten days after receiving my (our) request, obtain a Court order before those ten days have passed that directs my (our) child to remain in care.

RESPONSIBILITIES OF COMMISSIONER/AGENCY

I (We) understand that the Commissioner of Social Services or his representatives of the agency with which he places my (our) child for care, in accordance with the plan referred to above and to the extent that such facilities and services are available:

1. agrees to provide care, supervision, room, board, clothing, medical care, dental care and education for my (our) child;
2. agrees to inform me (us) of the name, address and telephone number of the agency caring for my (our) child;
3. agrees to work with me (us) to develop a service plan for my (our) child and me (us), including those casework and other special services needed to carry out the plan;

4. agrees to help me (us) make arrangements to visit my (our) child;
5. agrees to keep me (us) informed, through the agency providing care, about my (our) child's progress, development and health (other than routine health care); and
6. agrees to hear and act upon any complaints I (we) may have about care and services provided to my (our) child and me (us).

RESPONSIBILITIES OF PARENTS

As the parent(s) (legal guardian) of this child, I (we):

1. agree to cooperate with the representatives of the Commissioner of Social Services and the staff of the child care setting where my (our) child is placed to determine and carry out the best plan for my (our) child and me (us);
2. agree to visit and otherwise communicate with my (our) child in accordance with the plan;
3. agree to keep the agency providing care to my (our) child informed about my (our) plans for my (our) child's future care;
4. agree to keep the agency providing care to my (our) child informed of my (our) address, telephone number, place of employment, income and living arrangements;
5. agree to contribute, if possible, towards the cost of my (our) child's care. The amount will be determined in accordance with Department policy and my (our) means and will be stated in a written financial agreement; and
6. agree to the administration of any medical immunizations, tests and treatments, including dental and surgical treatment, that are considered necessary for the well-being of my (our) child. I (We)

understand that I (we) will be consulted, if possible, whenever surgery is necessary. However, in the event that my (our) child requires emergency surgery, I (we) authorize the Commissioner to consent to such emergency surgery if, for any reason, I (we) cannot be consulted. I (We) also agree that whenever an emergency arises requiring immediate medical and/or surgical care, and in the treating physician's judgment an emergency exists and that any delay caused by an attempt to secure consent for treatment would increase the risk to my (our) child's life or health, necessary care may be provided immediately.

I (We) have received a copy of the Department of Social Services publication entitled, "The Parents' Handbook". I (We) understand that this publication contains additional information about items discussed in this agreement and about other matters related to the foster care of my (our) child. The worker from the Department of Social Services has discussed the contents of the publication with me (us). I (We) understand that I (we) can ask for further explanation or clarification of the information contained in this publication at any time.

I (We) have read and understand this agreement which will be in effect during the time my (our) child is in placement. I (We) have received a copy of this agreement.

Dated this _____ day of _____ 19____

Signature of Parent or Guardian

Signed in the presence of

Signature of Parent or Guardian

ADDITIONAL INFORMATION FOR PARENTS OF CHILDREN IN FOSTER CARE

1. Under the Social Services Law of the State of New York, the parent's (s') failure to visit a child for six successive months, without good reason, may be considered abandonment. Under the Family Court Act of the State of New York, the parent's (s') failure for a period of more than one year following placement to maintain regular contact with or plan for the future of the child, although physically and financially able to do so, may be considered permanent neglect. In either of the above situations, a Court action may be taken to terminate parental rights.
2. According to the provisions of Section 358-a of the Social Services Law, if my (our) child remains in care more than thirty days, a proceeding will be initiated in the Family Court to obtain Court approval of this agreement.

Department of Social Services
Special Services for Children

REQUEST FOR DISCHARGE OF CHILD FROM FOSTER CARE

1. My name: _____
2. My current address: _____
3. My current phone number: _____
4. My child's name: _____

5. My child's birthday: _____
6. The name of the agency caring for my child is: _____
7. I want my child returned to me on: (fill in date) _____

ANSWER THE QUESTIONS BELOW:

1. Will your child live with you after he or she comes home?
Check one ☐ Yes ☐ No
If you answered No, tell us who your child will live with: _____
Name of person and relationship to you

Address

2. Will you be caring for and supervising your child during the day?
Check one ☐ Yes ☐ No
If you answered No, tell us who will care for and supervise your child during the day:

Name of person and relationship to you or name of agency

3. How do you plan to support your child? (Check all that apply)

_____ Work
_____ Public Assistance
_____ Social Security or Supplementary
Security Income (SSI)
_____ Other

Signed _____ Date _____

APPENDIX 8

NEW YORK CITY POLICY STATEMENT
ON VISITATION

The City of New York
Human Resources Administration

MEMORANDUM

DATE: September 16, 1975
TO: Executive Directors, Voluntary Child-Caring
Agencies Staff, Special Services for Children
FROM: Carol J. Parry, Assistant Commissioner
Department of Social Services
Special Services for Children
SUBJECT: *Policy Statement on Parental Visiting*

The importance of parental visiting with children in foster care has long been recognized. The attached policy statement has been developed for staff at all levels to affirm this importance and to establish guidelines in this area.

I particularly want to call your attention to item 6 on page 4, which provides information concerning reimbursement to parents for transportation expenses incurred by visiting their children in care. Currently, reimbursement to eligible families for unexceptional costs is covered by the per diem rate and is to be provided directly by the voluntary agency or the SSC direct care program. Exceptional costs (distant upstate visits, out of state visits) may be considered as a separately reimbursable item to agencies. A procedure is being developed to cover these cases, and will be distributed shortly. Until that procedure is ready, please contact the appropriate SSC Unit of Accountability

Team if you require special reimbursement for exceptional costs. Reimbursement to eligible families for unexceptional costs should be currently available under existing policy and need not wait for the new procedure.

I welcome any comments you may have about this statement. In the near future, I hope that this policy statement will be translated into appropriate contract language, and State and City regulations.

POLICY STATEMENT ON PARENTAL VISITING

Carol J. Parry

Assistant Commissioner
Department of Social Services for
Special Services for Children

"Like the frequent monitoring of body temperature information for assessing the health of patients in hospitals, the visitation of children should be carefully scrutinized as the best indicator we have concerning the long term fate of children in care."

This conclusion was drawn by Dr. David Fanshel, co-director of the five year longitudinal investigation of foster care in New York City, known as the Child Welfare Research Project. A key finding of the research is that the association between parental visiting and the discharge of children from care is a critical one. The more frequent the visitation, the more likely the child would return home.

The critical importance of parental visiting with their children in foster care has long been recognized in the

child development literature. These visits are important for many different reasons:

- no matter how troubled or difficult the parents may be, the child may miss them deeply. They are his roots to his past. When he is separated from them, he feels that he has lost a part of himself;
- continuing contact with natural parents has an ameliorative effect on the otherwise detrimental consequences of long-term foster care;
- continuing contact with the natural parents gives the child opportunities to see his parents realistically and rationally and dispel highly irrational feelings and images;
- visits help calm some of the child's irrational separation fears; fears such as the parents are dead, the parents placed the child because they hated him or he was unimportant to them, etc.;
- visits may be therapeutic for the parents if the worker uses them to help the parents be better parents to the placed child, to bring out their "best" when they are with the child;
- if a child is to be returned to his family, visiting is absolutely essential. A child will experience innumerable problems if he is returning to a family where he has become a stranger.

The parent-child tie has deep emotional significance to both the parent and the child. It may be distorted by physical separation but not eliminated.

There is yet another reason why parental visiting is so important. According to New York State law, failure by a parent to visit during a specified period of time without good reason could be grounds for termination of parental rights.

Some agencies have taken concrete actions to facilitate parental visiting. These include supplying carfare to parents, running special buses to agencies on a regular basis and setting aside a few days each year for special activity days for children and their parents. We recognize the value of these activities and wish to commend those agencies that engage in them.

However, despite these gains, the area of parental visiting continues to be characterized by inadequate policies and practices. Too frequently

- during the early part of placement, when children need the support and encouragement of families, they are not permitted visitation. Studies have shown that the children do not "settle better" when their parents are forbidden to see them;
- workers fail to discuss with parents why visiting is so critically important while children are in care;
- agency visiting policies severely limit the number of visits possible;
- visits last for very short periods of time;
- visits take place in very unnatural settings which preclude natural interaction between children and parents;
- placement settings where visits take place are at great distances from the inner city, necessitating the expenditure of time and money;
- regularly scheduled visiting is discouraged;
- honoring requests for visitation by parents is contingent upon the convenience of the foster parent and the agency worker with little regard for the convenience of the family;
- the agency fails to facilitate visits by preparing children and foster parents for the visits;
- agencies fail to emphasize the relevance and

importance of visits to the developmental needs of children of all ages, but especially those under six years of age;

—agencies unilaterally limit or terminate visits without adequate explanation based on consistent standards.

Clearly, our beliefs about the importance of parental visiting are not consistently supported by our practice and policy. This may, in part, be explained by the emphasis we place on another objective: to maintain children in stable situations, free from the trauma and damage that change inevitably creates. This objective is sometimes thought to be inconsistent with an emphasis on parental visiting because visiting often generates problems which can jeopardize stability.

Parental visiting can be problematic. Visits may be characterized by interpersonal stress. There are children who are overwhelmed by anxiety each time they see their parents. Some are upset by their parents' unpredictable or disturbed behavior. Some children may become extremely unhappy and difficult to handle after visits. There are parents who may be hostile toward and critical of their children or the foster parents. Some will be argumentative, uncooperative or unpredictable. A few may even try to sabotage the work of foster parents and the agency.

Nevertheless, both despite these problems and because of them, I must stress how very important it is for agencies to strongly encourage parental visiting. We must weigh and give full value to the important benefits that derive from parent-child visiting against the various problems, ranging from administrative to psychological, that such visiting creates. A child who has recently been placed may become particularly upset after a parental

visit. The response to this must be to work with the child and his parents, not to eliminate the visits. A parent may demonstrate his reluctance to visit by cancelling appointments or arriving late. The response to this must be to reach out to these parents, to explain why their visits are so critical, to offer any assistance that will facilitate the visits, not to ignore the parents. A parent's manner or behavior may be considered dangerous to the child. The response to this must be a skilled explanation about why such behavior is unacceptable and the development of a contract between the worker and parent specifying what behaviors are not acceptable if visiting is to occur, not to unilaterally terminate the parent's right to visit. A parent may request longer visits, evening visits, visits outside of the agency office or foster home, visits on weekends and holidays to the parents' home. The response to these requests must be a serious discussion between the parent and the worker, where the benefits and problems are weighed and a mutual decision agreed upon, not a dismissal out of hand because "it's never been done before" or "it's against agency policy".

Over the years, restrictive visiting policies and practices, based more on the exceptional case rather than the rule, have developed. These policies and practices, where they exist, must be changed, in order to address the real needs of parents and their children. Special Services for Children is affirming the critical importance of parental visiting. As a very first step, all agencies shall be responsible for assuring that each of its congregate facilities and foster homes maintains a register in which the name and address of each person visiting the child can be entered with the date of each visit (existing SBSW rules require this). Extremely infrequent visiting or no visiting by the parent or guardian should trigger an appropriate response. There

will be too many parents who will not visit. Whatever the reason, it is critically important that our reaction to this parental "giving up" is not "giving up" ourselves, but aggressive reaching out. Only in that way can we impress upon parents how very important their visits with their children are.

The following guidelines will help in the development of better visiting policies and practices:

1. An agency-wide policy which prohibits any parent from visiting during the "early part of placement" (up to 6 months) must be changed. Visiting during this time may be prohibited by a Judge. In specific cases, an agency may determine that visits would be dangerous and therefore favors elimination of the visits until the danger no longer exists. The decision must be discussed at length with the parent and be approved by SSC. A parent may request that the decision be reviewed by the Parents' Rights Unit at SSC.
2. At the time a child is placed in a foster care setting, the agency worker must discuss with the parents the critical importance of visiting while the child is in care. The worker should discuss with the parent both the likely positive and negative consequences of a visit. (S)he must stress the urgency of visiting during the early part of placement. Moreover, the worker should state that (s)he will facilitate visits in any way possible.
3. An agency-wide policy which limits visits to once a month or even every two weeks must be changed. The frequency of visiting will depend upon a number of factors (e.g.,

location of agency, number of children at home, number of children in care in other agencies, reason for placement, etc.), but ultimately must be agreed upon by the parent and worker. The parent's desires and needs must take priority over the convenience of the foster parent and the agency. Weekly visits should be encouraged whenever possible for the parent, not prohibited.

4. An agency-wide policy which limits all visits to one hour must be changed. Again, the length of the visit should depend upon several factors, such as how long the parent traveled to the place of the visit, how much it cost, the age of the child and the length of time between visits. Once again, the parent and the agency worker must reach agreement on this matter.
5. Visits must not be limited to small, perhaps poorly equipped visiting areas in agency settings. Visits in the foster home, in the parent's home (where the child is brought by the agency worker) and outdoors should be considered. The location of visits should also be a "contracted" part of the plan.
6. Parents must not be prevented from visiting their children because they are unable to pay for the necessary transportation. Reimbursement to eligible families for transportation costs is covered by the per diem rate and is to be provided directly by the agency. When the children are cared for in SSC Direct Care programs, reimbursement to eligible families for transportation costs is available through the Imprest Fund. Families are eligible for reimbursement for these costs when:
 1. visiting is a part of the service plan which has been developed by the agency and the parent; and

2. the family is receiving public assistance; *or*
 3. the financial evaluation that is done in accordance with the criteria of SSC Procedure No. 1 shows a budgetary deficit, or there would be such a deficit if the family was required to assume the transportation costs without assistance.
7. Parents must not be prevented from visiting their children when traveling is problematic for reasons other than expense. A parent may want to visit the child, but cannot do so for many different reasons. For example, the parent is ill and is not permitted to leave the home, there are other children in the home who require the presence of the parent, etc. Under such circumstances, consideration should be given to the worker's bringing the child to the parent's home, so that visits are not limited or prevented for those reasons.
 8. If a parent wants to set up a regular visiting schedule, and this schedule is consistent with the child's best interests, the worker should incorporate it into the plan. The convenience of the agency or the foster parent can no longer be the determining factor. Moreover, workers must not "test" parental interest and concern by requiring that appointments be made prior to each visit, if the parent expressed interest in a regular visiting schedule.
 9. The agency worker must discuss the matter of parental visiting with the child and his foster parent (or other surrogate caretaker). Skillful work in this area should minimize some of the problems created by parental visits.

10. Agencies should provide training for their workers specifically related to child developmental issues. For example, the particular importance of frequent parental visiting for children at different stages of their development should be discussed and translated into agency practice.
11. An agency-wide policy that does not allow a child to visit home on weekends and holidays must be changed. Again, this is a decision that will be influenced by several factors and must ultimately be agreed to by the parent and the agency worker.
12. An agency-wide policy that does not allow evening visits must be changed. This, too, is a decision that will be influenced by several factors and must be agreed to by the parent and agency worker.
13. Limiting or terminating parental visits must be avoided whenever possible. A decision to limit or terminate visits must be carefully explained to a parent and approved by SSC. The agency must inform the parent that the decision can be appealed in the Parents' Rights Unit at SSC or appealed to a Judge.

It is time that all our actions become focused on our articulated goals for families involved in the child welfare system. I am sure that all agency child care staff at all levels share these concerns and goals with me. SSC staff is available to assist agencies in any way possible to help facilitate parental visiting and to help achieve the reunion of families wherever this is possible.

APPENDIX 9

UNREPORTED STATE COURT DECISIONS
RE: WALLACE CHILDREN

M E M O R A N D U M

SUPREME COURT, NASSAU COUNTY

TRIAL TERM, PART XXI,
(3/12, 13, 17-21 & 24, 1975)

STATE OF NEW YORK in Rela-	)	By BERNARD F.
tion to PATRICIA A. WALLACE	)	McCAFFREY J.
on behalf of CHERYL LYNN)	
WALLACE, PATRICIA ANN	)	Dated June 27, 1975
WALLACE, CATHLEEN ROSE)	
WALLACE, CYNTHIA MARIE	)	Index No. 11275/74
WALLACE,)	
<i>Petitioners,</i>)	
— against —)	
)	
GEORGE LHOTAN and)	
DOROTHY LHOTAN,)	
<i>Respondents,</i>)	
and)	
)	
JAMES M. SHUART as Commis-)	
sioner of the Department of Social)	
Services of the County of Nassau,)	
<i>Respondent.</i>)	

JOHN C. SCHAEFFER, JR., ESQ.	MARCIA ROBINSON LOWRY, ESQ.
By: SETH P. STEIN, ESQ.	PETER BIENSTOCK, ESQ.
Attorney for Petitioner	Attorneys for Respondents, Lhotan
Legal Aid Society of	Children's Rights Project
Nassau County, N.Y.	New York Civil Liberties Union
Civil Division	84 Fifth Avenue
214 Third Street	New York, New York 10011
Mineola, New York	

ELSIE FRIED, ESQ.	JOHN F. O'SHAUGHNESSY, ESQ.
Law Guardian	By: JAMES GALLAGHER, ESQ.
77 Cherrytree Lane	Attorney for Respondent, Shuart
Roslyn Heights, New York 11577	County Attorney of Nassau County
	Executive Building
	West Street
	Mineola, New York 11501

Prior to the issue of custody being resolved, it was necessary for this Court to make a determination that the New York State Supreme Court had jurisdiction to determine the issue of custody even though the respondents, Lhotans, had obtained a Federal Court stay against the parties proceeding in this Court.

Thus, in this custody matter by way of a Writ of Habeas Corpus, the petitioner, Patricia A. Wallace, the natural mother of four female children, ages eight, nine, eleven and twelve, is seeking their return and custody. The children are presently living with foster parents, George and Dorothy Lhotan, the respondents in this proceeding.

The petitioner voluntarily placed the four girls and their two younger brothers with the respondent, Department of Social Services of the County of Nassau, for care in September, 1970. The children at no time were surrendered for the purpose of adoption. The two older girls were placed with the Lhotans, as foster parents, on September 4, 1970; the two boys were

placed in a third foster home, and subsequently on September 29, 1972, transferred to the Lhotan's foster home. Following a recommendation of the Department of Social Services the two boys were returned to the custody of their natural mother on December 13, 1972, pursuant to an order of the Family Court.

The Lhotans, as foster care "custodians" have never had custody of the girls. The custody was and presently is in the Department of Social Services.

On or about June 17, 1974, a finding was made by the Psychiatric Consultation Clinic of the Nassau County Mental Health Board that the Lhotan home was not emotionally suited for the Wallace children in that it is rigid and controlling, and prejudicial against the natural mother. In addition, the Nassau County Department of Social Services, after investigation, found there was a deliberate course of conduct by the Lhotans to foster a negative attitude by the children toward their mother, rather than to make efforts to establish a normal relationship under the circumstances. Based upon the aforesaid conclusion, on June 26, 1974, the Department of Social Services informed Mr. and Mrs. Lhotan of their intent to remove the four Wallace girls from their home in compliance with 18 NYCRR 450.10. It was the department's decision at this point to return the two younger girls to their natural mother and place the two older girls in another foster home until their father would be able to care for all of them.

The Lhotans were notified by the Department of Social Services of their right to a conference prior to the removal of the children from their home. Application was made for such conference, but, prior to the scheduled date therefore, the Lhotans obtained a temporary restraining order in the United States District Court for the Southern District of New York, enjoining the Nassau County Department of Social Services from

removing the children from the Lhotan foster home, and, thereafter, against the parties proceeding before this Court in this matter.

At this time the Lhotans joined in a class action pending before a three-judge federal panel convened to determine the constitutionality of the procedures encompassed in the Social Services Law of the State of New York, and promulgated in the Rules and Regulations of the New York State Department of Social Services relating to the removal of children from foster homes. The Lhotans and the Wallace girls joined the federal action as party plaintiffs, and the Department of Social Services of the County of Nassau was joined as a party defendant.

Thereupon, the petitioner, Patricia A. Wallace, instituted this Habeas Corpus proceeding seeking the return to her custody of all four of her children currently in foster care. The Lhotans and the Department were named as respondents in the action.

Thereafter, the Lhotans moved in this Court to dismiss the Writ of Habeas Corpus and stay the proceedings thereunder, contending the Federal Court had jurisdiction of the issues presented in the aforesaid Writ. This Court, after argument, refused to dismiss the Writ or stay further proceedings pending determination of the Federal Court class action. (*State of New York, ex rel, Patricia Wallace v. Lhotan*, 80 Misc. 2d 464, 363 N.Y.S. 2d 425), stating:

"... in order for the state court to be precluded from taking action in a writ of habeas corpus the issue of the custody of the subjects of the writ must be before the federal court. The issue in the class action in front of the federal court is the question of the constitutionality of state law and regulations governing the removal of children from the care of foster parents in New York State. * * *

In the instant action the issue is one of custody, brought before this court by the natural mother (*not a party to the federal court action*) seeking the return of her children that she voluntarily placed in the custody of the Department of Social Services for temporary placement and not for adoption. The court is of the opinion that these are two separate and distinct issues and thus fails to preclude a state court action. * * *

The court notes that there is a long history of cases in which the federal courts have consistently rejected federal jurisdiction over cases where, as in this custody proceeding pending before the state court, there is no constitutional question involved as distinguished from the class action pending in the federal court involving the constitutionality of a statute involving disputes in the domestic relations area. The holdings have consistently stated the principle that domestic relations should be left for the states." * * *

... Thus, having determined that in this instance the provisions of CPLR §7003(a) do not mandate dismissal of petitioner's writ of habeas corpus, the question remaining is whether as a matter of comity and justice this court should stay the pending custody proceeding. ... " * * *

... in no respect will the federal court action determine the fitness of the natural mother to resume custody of her children. The custody determination should be made by the State Supreme Court where both statute and reason have placed jurisdiction. ... "

The decision of this Court was thereafter affirmed on appeal without opinion by the Supreme Court, Appellate Division, Second Department. (May 5, 1975, ____ A.D. 2d ____)

Upon the return day of the stay before the three-judge federal court, the stay originally granted to the Lhotans against the Department of Social Services was vacated, and the prohibition against the parties proceeding in this Court was withdrawn.

In the interim, the Department of Social Services decided that the four children should be returned to the petitioner and that they would participate in the instant proceedings in support of Mrs. Wallace's attempt to gain the return of all four girls.

Also at this time, the Court further determined that it would be in the best interests of the children to appoint Elsie Fried, Esq., as Law Guardian for the four infants pursuant to a motion made just prior to the commencement of the actual hearing of this Writ of Habeas Corpus.

It is the contention of the foster parents that the removal of the children from the home in which two of the children have lived for approximately four and one half years, and the other two have lived for approximately two and one half years, will not promote the best interests of these children and will cause them great psychological damage. Further, the foster parents urge that the petitioner, Patricia Wallace, is unfit to assume the custody of her children by reason of her history of psychological problems, and that she has abandoned her children by infrequently visiting or contacting them while they were in the foster home.

The Courts in New York State have consistently held that the policy of this state is that, unless it is established by the adverse party that the natural parent(s) are unfit to assume the duties and privileges of parenthood, or that the right to parenthood has been abandoned, there is a presumption that it is in the best interests of the children to reside with their natural parent(s) (*People ex rel Kropp v. Shepsky*, 305 N.Y.

465; *Spence-Chapin Adoption Services v. Polk*, 29 N.Y. 2d 196). The Courts have gone so far as to hold that the status of a natural parent is so important that in determining the best interests of the child, the presumption may counterbalance or even outweigh superior material and cultural advantages which may be afforded by adoptive parents. (*Spence-Chapin Adoption Services v. Polk, supra*)

It is apparent from the testimony presented at the hearing that at the time of the voluntary placements in September, 1970, of her six children, Mrs. Wallace was unable to care for the children. This was noted by her own admissions. It was at this time that the petitioner was having psychological problems, which she herself described as a "post partum depression." These problems severely interfered with her ability to function effectively as a mother to these children.

Mrs. Wallace testified that, although she still has a nervous "twitch" for which she takes medication, she has had no medical or psychological problems for a long period of time. It was stated that, although she currently is not under psychological care, she realizes that initially problems may develop during the period of readjustment, particularly if all four of her girls are returned to her at once, and that she is willing to go for counseling and to undertake supportive psychotherapy.

The records of the Department of Social Services and the testimony of their representatives have gone far to show that the petitioner is a fit mother, particularly in light of her demonstrated concern and ability to care for the two sons who were returned to her custody over two years ago.

The Law Guardian, Elsie Fried, Esq., performed exceptional services in this matter and devoted an extensive amount of time and energy on behalf of the

infants. The Court has considered her report on an *advisory* basis only.

The Law Guardian made no recommendations in her report other than to submit what she observed during her visit to the Lhotan home and her unannounced visit to the Wallace home. She found the Lhotan home to be a well-kept home, and in her conversations with the Wallace children they told her they did not want to go back to their mother and wanted to stay with their foster parents. She found, on her unannounced visit, the Wallace home to be clean. Mrs. Fried discussed with Mrs. Wallace's two sons, John age six and Billy age four, school and home activities. Based upon her factual observations it is the Court's opinion that the children apparently appear to be content and well-cared for by their mother.

It is the Court's determination that, aside from an isolated incident of September, 1970, concerning which the testimony is in dispute, there is no credible evidence upon which the Court could base a finding that Mrs. Wallace neglected her children. Nor is there such credible evidence that Mrs. Wallace maintained a course of conduct of entertaining boyfriends in the home, or of leaving the children unattended.

It is, thus, the decision of this Court that the respondents, in their case, have failed to prove that Mrs. Wallace is unfit.

The respondents also contend that the natural mother has abandoned the children by only visiting them infrequently while they were in the foster home and that, therefore, she is not entitled to the return of the children.

Abandonment has been defined as: "a settled purpose to be rid of all parental obligations and to forego all parental rights," (*Matter of Susan W. et al. v. Talbot G.*, 34 N.Y. 2d 76; *Matter of Maxwell*, 4 N.Y.

2d 429). To the contrary, in the matter before this Court the actions of the petitioner in her dealing with the Department of Social Services shows a definite pattern of conduct wherein she sought visitation with her children.

There are several circumstances which contributed to the fact that over the four years of separation Mrs. Wallace had not visited her four daughters regularly. During the first two years, Mrs. Wallace resided in Long Beach while the two youngest daughters lived in Levittown and the two oldest daughters resided in Hicksville. Thereafter, all four daughters resided in Hicksville. Testimony was given at trial to the effect that Mrs. Wallace had applied to the Department of Social Services for a transportation allotment so that she could visit her children. Such was never received as there is no provision therefor by the Departments. This factor, along with the financial limitations of the petitioner and the negative attitude in the Lhotan foster home towards her contributed to her lack of visitation. In addition, the Court finds that a lack of visitation on her part during the early period of her separation from her children is attributable to her emotional condition at the time and a sincere belief on her part that it was in the best interests of the children that she did not visit with them until she was fully capable of coping with her emotional problems. Although testimony did show a lack of regular visitation, there was testimonial and documentary evidence given that Mrs. Wallace always wanted her children returned.

Since a finding of abandonment can be made against a parent only after she has been given the benefit of every controverted fact (*Matter of Bistany*, 239 N.Y. 18; *Matter of Cocozza*, 35 A.D.2d 810), the Court determines, from the credible evidence presented at the hearing, that the respondents have failed to establish that Mrs. Wallace abandoned her children.

The respondents in the briefs submitted by their attorneys argue that the presumption in favor of the natural parent should be discounted by the Court, even though the Court feels it is based on sound legal principles and also reflects considered sound judgment respecting the family and parenthood. It is argued that in its place the Court should consider only what is in the best interests of the children. What the respondents failed to recognize is that in any custody proceeding this is always the paramount concern of the Court. Just because the Court may employ a presumption as a guideline in making a determination does not mean that the Court does not fail to view the whole picture when such a proceeding is undertaken before it. The respondents have also failed to note the pronouncement rendered in the decision wherein the Court denied their application to dismiss the instant Writ. In that decision, a portion of which has been quoted earlier in this determination states and again reiterates:

"Further, proper consideration must be given to the rights of the petitioner and the most important factor of all is a determination as to the best interests of the Wallace children. This latter factor takes on even added importance as to the discretionary determination of comity for one of the cardinal obligations of the court is that infants are wards of this court. Therefore, it is the responsibility of this court to assure that a just and expeditious determination be made of the custody issue proceeding instituted before this court by their natural mother."

The presumption is but a guideline in protecting the rights of the natural parent. As to the children, the Court, after considering the facts and evidence presented in a custody controversy, may determine what is in the best interests of the infants and, thereafter, in

the exercise of its discretion award custody. (*Matter of Stuart*, 280 N.Y. 248, *Matter of Benitez*, 47 A.D.2d 566)

The respondents in this proceeding sought to establish that the best interests of the children would be served by maintaining the status quo and continue the residence of the children with the present foster parents. To sustain their position they offered the testimony of psychiatrists who testified to the possible traumatic effect of removal of the four Wallace girls from the Lhotan home and relied on a publication written by three noted psychoanalysts espousing a theory of the psychological mother, which in essence states that whoever a child identifies as its mother is its mother.

The petitioner offered as witnesses psychiatrists who testified that, though it may be traumatic at first and outside assistance might be necessary in the early stages of the transition to the mother's residence, in the long run they concluded it would be best for the children to be returned to the natural mother.

This difference of opinion between the psychiatrists is not to be considered surprising. Although considerable advancement has been made in the field of psychiatry, as yet it has not been established as an exact science. Thus, the practice is for each side to select a psychiatrist who supports his opinion. Unfortunately, this will continue to be the practice until such time as, at least in custody matters, expert psychiatric testimony could be designated and presented to the Court on a non-adversary basis with the sole objective of aiding the Court in determining the best interests of its wards. In any event the ultimate determination after evaluating the testimony of the psychiatrists must evolve from the determination of the Court as to the actual psychological effect, both good and bad, a return

of the children to the petitioner might have as opposed to continuing the present course of life of the children.

Testimony offered by the respondents' witnesses was also elicited in an effort to illustrate the reluctance of the children to return to their natural mother. This apprehension of the children to be returned to the natural mother was also manifested in the Court's interview with the children. Though all four of the girls have informed the Court that it is their desire not to be returned to their natural mother and that they prefer to remain with the Lhotans, the negative feelings against their natural mother were most strongly held by the two eldest, and it seemed that the youngest two tended more to parrot the view of their sisters rather than to express their own views, should such individual expression be possible considering their tender years and the length of time away from their mother.

The petitioner endeavored to attribute the children's aversion concerning return to the domineering effect and controlling influence of the respondents. However, in weighing this aspect as to the preference of the children, the Court must also consider the evaluation of respondents' expert psychiatric witness, Dr. Marie Friedman. This witness, who clinically examined the children, offered testimony that any opinion or desire of the children at this time was motivated by a fear of being separated from one another and their desire to continue as a family unit. This witness stated this conclusion particularly in light of the earlier experience of the four girls in having been placed in two separate foster homes.

Although the Court feels there is merit to the petitioner's argument relative to the controlling effect of the Lhotans over the conduct of the children, it also notes that the foster parents did show love and concern towards the children.

Yet, it is the opinion of the Court that the main concern of the children in their evaluation of their present and future lives is the fear, based upon the circumstance of their initial placement by the Department of Social Services, of being separated from one another.

The respondents, in attempting to resist the efforts of Mrs. Wallace to regain custody of her children, have failed to move affirmatively for any type of relief. The respondents do not have, nor do they seek legal custody. Legal custody when the children were placed with the Lhotans remained with Nassau County Department of Social Services. The Wallace children were placed on a temporary foster parent basis with the Lhotans. Persons accepting such foster children do so with the understanding that the children will return to their natural parents as soon as feasible and one of their responsibilities is to prepare the children psychologically for their contemplated return to their natural home. (*Matter of Jewish Child Care Association of New York*, 5 N.Y.2d 222)

It was the finding of the Department of Social Services that the Lhotans failed to prepare the children for such return and that, should custody not be awarded to Mrs. Wallace, the Department would nevertheless remove the children from the Lhotans and place them elsewhere.

The Court is not predicated its decision on what steps the Department of Social Services may or may not legally take as to the removal and transfer of children from one foster home to another, nor is the possibility of such a further referral to another foster home a factor in the Court's determination. The Court is predicated its determination solely on what it deems to be in the best interests of the children, and this

determination of the Department of Social Services is being set forth only to reflect that the Department deems it to be in the best interests of the children to remove them from the Lhotan foster home.

The Court, in arriving at its conclusions, was mindful that, although the petitioner has assumed the surname (Wallace) of the father of her children, she was never formally or legally married to John Wallace.

Although the respondents were afforded an opportunity to pose questions relative to this circumstance, they have done so only to a limited extent and have not placed in issue any facts which would prevent the Court from arriving at any of the aforementioned determinations.

After having carefully reviewed the record (1113 pages of transcript) of the extensive eight day hearing, the affidavits submitted by the petitioner demanding the return of the children, the briefs submitted by the petitioner, Mrs. Wallace, the extensive brief submitted by the respondents, Lhotans, consisting of 115 pages, and the report submitted by the Law Guardian, Elsie Fried, Esq., and after having interviewed all four of the Wallace girls, the Court has come to the conclusion, based upon all the credible evidence, that the best interests of the four girls shall be served by their return to the petitioner, their natural mother.

Accordingly, this Writ of Habeas Corpus is sustained.

Furthermore, though it is of critical importance that all of the children be afforded the opportunity to be reunited as a family unit, the Court concludes that it would be in the best interests of all concerned that this be accomplished in a staged or programmed return. The Court directs the respondents, Lhotans, to return the two youngest girls, Cathleen and Cynthia, within ten days of the date of service upon them of the order signed simultaneously herewith, to the natural mother,

Mrs. Wallace, and thirty days thereafter the remaining two eldest girls, Cheryl and Patricia, shall be returned to the natural mother, Mrs. Wallace.

The respondent, Nassau County Department of Social Services, is directed to discharge the custody of Cheryl Wallace, Patricia Wallace, Cathleen Wallace and Cynthia Wallace to their natural mother, Patricia A. Wallace.

However, the return of the Wallace children to their mother shall be under the supervision of the Nassau County Department of Social Services and the said Department of Social Services shall continue the supervision of the Wallace children for a period of one year. Any time during, or at the expiration of the aforesaid year the Department of Social Services may terminate further supervision or make such application to the Court as it may deem to be in the best interests of the children.

During the course of the trial there was testimony to the effect that during the period of re-adjustment with her four children it might be necessary for her to undertake supportive psychotherapy. Mrs. Wallace stated her willingness to participate in any such psychotherapy to assist her in coping with any problems which might arise out of a return of the four girls to her care. Therefore, the petitioner, Mrs. Wallace, is directed to adhere to any directive which the Nassau County Department of Social Services makes, particularly should they determine that it is necessary for the petitioner to be referred to the Nassau County Psychiatric Consultation Clinic or the Family Court Mental Health Clinic for supportive psychotherapy during the period of re-adjustment with her four female children.

In addition to such other supportive services as may be appropriate, the Nassau County Department of Social Services shall provide a homemaker to assist Mrs. Wallace until such time as the Department of Social

Services decides that homemaking services are no longer needed.

Short Form Order signed simultaneously herewith.

J.S.C.

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

TRIAL TERM, PART XXI – NASSAU COUNTY

Present:

HON. BERNARD F. McCAFFREY

Justice.

STATE OF NEW YORK in Rela-)	
tion to PATRICIA A. WALLACE)	
on behalf of CHERYL LYNN)	
WALLACE, PATRICIA ANN	)	Index Number
WALLACE, CATHLEEN ROSE	)	11275, 1974
WALLACE, CYNTHIA MARIE)	
WALLACE,	)	Hearing Date
<i>Petitioners,</i>	)	March 12, 13, 17-21
	)	and 24, 1975
– against –)	
	)	Motion
GEORGE LHOTAN and	)	Cal. Number
DOROTHY LHOTAN,)	
<i>Respondents,</i>	)	Trial
and	)	Cal. Number
)	
JAMES M. SHUART as Commis-)	
sioner of the Department of Social)	
Services of the County of Nassau,)	
<i>Respondent.</i>)	

The following papers number 1 to read on this application
for a Writ of Habeas Corpus

Papers Numbered

Notice of Motion/Order to Show Cause
 Answering Affidavits
 Replying Affidavits
 Affidavits
 Filed Papers
 Pleadings — Exhibits — Stipulation
 Briefs: Plaintiff's/Petitioner's
 Defendant's/Respondent's

Upon the foregoing papers it is ordered that this application for
a Writ of Habeas Corpus, after a hearing, is sustained.

The respondent foster parents, Lhotans, are directed
within ten days of service of a copy of this order on
them, to return the two girls, Cathleen Wallace and
Cynthia Wallace, to their natural mother, Patricia A.
Wallace, and thirty days thereafter the respondents,
Lhotans, are directed to return the remaining two girls,
Cheryl Wallace and Patricia Wallace, to their natural
mother.

However, the return of the Wallace children to their
mother shall be under the supervision of the Nassau
County Department of Social Services; and the Depart-
ment of Social Services shall continue the supervision of
the Wallace children for a period of one year. At any
time during this period, or at the expiration of the
aforesaid year, the Department of Social Services may,
if it deems it in the best interests of the children,
terminate further supervision or make such application
to the Court as it may deem to be in the best interests
of the children.

Further, the petitioner, Mrs. Wallace, is directed to
adhere to any directive which the Nassau County

Department of Social Services makes, particularly
should they determine that it is necessary for the
petitioner to be referred to the Nassau County Psychi-
atric Consultation Clinic or the Family Court Mental
Health Clinic for supportive psychotherapy during the
period of readjustment with her four female children.

In addition to whatever supportive services it appro-
priates, the Nassau County Department of Social Ser-
vices shall reinstitute homemaker service to assist Mrs.
Wallace until such time as the Department of Social
Services decide that homemaking service is not needed.

See memorandum decision filed simultaneously here-
with.

Relator is directed to serve a copy of this order on
the respondents, Lhotans, and the Nassau County
Department of Social Services.

Dated JUL 8 1975

J. S. C.

SUPREME COURT, NASSAU COUNTY

TRIAL TERM, PART XXI
(9/8, 9, 10, 11, 12,
16 & 19, 1975)

STATE OF NEW YORK in Rela-)
tion to PATRICIA A. WALLACE)
on behalf of CHERYL LYNN)
WALLACE, PATRICIA ANN)
WALLACE, CATHLEEN ROSE)
WALLACE, CYNTHIA MARIE)
WALLACE,)
Petitioners,)

— against —)

GEORGE LHOTAN and)
DOROTHY LHOTAN,)
Respondents,)

and)

JAMES M. SHUART as Commis-)
sioner of the Department of Social)
Services of the County of Nassau,)
Respondent.)

BY BERNARD F.
McCAFFREY

DATED October 27,
1975

Index No.
11275/74

JOHN C. SCHAEFFER, JR., ESQ. MARCIA ROBINSON LOWRY, ESQ.
By: SETH P. STEIN, ESQ. PETER BIENSTOCK, ESQ.
Attorney for Petitioners Attorneys for Respondents, Lhotan
Legal Aid Society of Children's Rights Project
Nassau County, N.Y. New York Civil Liberties Union
Civil Division 84 Fifth Avenue
214 Third Street New York, New York 10011
Mineola, New York 11501

ELSIE FRIED, ESQ. JOHN F. O'SHAUGHNESSY, ESQ.
Law Guardian By: JAMES GALLAGHER, ESQ.
77 Cherrytree Lane Attorney for Respondent, Shuart
Roslyn Heights, New York 11577 County Attorney of Nassau County
Executive Building
West Street
Mineola, New York 11501

By order dated July 8, 1975, this Court (Mr. Justice McCaffrey) granted the Writ of Habeas Corpus brought by petitioner, Patricia A. Wallace, and directed that the foster parents, Mr. and Mrs. Lhotan, return the four children to their natural mother, Mrs. Wallace.

The children were never returned, and at this time are still with the foster parents, Lhotans, in that the respondents, Lhotans, obtained from Part V of this Court an Order to Show Cause to re-open the hearing based on new evidence, and staying the return of the children.

This matter has already been the subject of an extensive hearing also involving a number of adjournments and motions, including a jurisdictional determination by this Court and affirmed by the Appellate Division that a pending federal court matter does not constitute a stay of this custody matter.

However, in the interest of justice this Court granted respondents' application and the hearing was re-opened and further testimony was taken on behalf of the parties.

In this custody matter the petitioner, Patricia A. Wallace, had voluntarily placed the four girls, Cheryl age 13, Patricia age 12, Cathleen age 10, and Cynthia age 9, and their two younger brothers with the respondent Department of Social Services, in September, 1970. The children at no time were surrendered for the purpose of adoption. The two older girls were placed with the Lhotans, as foster parents, on September 4, 1970; the two boys were placed in a second foster home; and the two younger girls were placed in a third foster home, and subsequently on September 29, 1972, transferred to the Lhotan's foster home. Following a recommendation of the Department of Social Services the two boys were returned to the custody of their natural mother on December 13, 1972, pursuant to an order of the Family Court.

The custody of the Wallace children was in the Department of Social Services. The Lhotans, as foster care "custodians" have never had custody of the girls, nor have they ever by affidavit or testimony in this proceeding declared their intention to adopt the Wallace children, if they were available for adoption.

At the re-opened hearing the Court granted extensive latitude to the respondents, Lhotans, to produce witnesses and submit any further "new evidence" to support their application that the Court should reconsider its previous decision granting the Writ of Habeas Corpus brought by the petitioner.

The Court is not bound by the strict rules of evidence in a custody hearing. Rather, custody matters should not be actual adversary proceedings, but all relevant evidence should be admitted that can assist the Court in its capacity as *parens patriae* in making the important and traumatic determination as to what is in the best interests of the infants.

However, though the respondents, Lhotans, called a number of witnesses, their testimony at best was cumulative and in no way could be considered as new evidence to support the respondents Lhotans' contention that the petitioner, Mrs. Wallace, was not a fit and proper person to resume the custody and care of her children.

All of the witnesses testified to isolated instances which occurred several years ago, such as that Mrs. Wallace was not a good housekeeper and that the apartment was not maintained in a neat and clean manner; and that on a number of occasions they noticed that there was little or no food in the apartment. Though there was some undocumented testimony that on a couple of isolated unspecified occasions Mrs. Wallace appeared to be intoxicated; however, none of them testified as to her drinking any

intoxicating beverages other than beer. There was also further unsubstantiated testimony that Mrs. Wallace was living with a Benny Bogutzski, but this at best was innuendo evidence and there was no credible evidence that such relationship, if any, in any way affected the best interests of the children.

Most of the isolated instances related to incidents that occurred years ago, as typified by the testimony of one of the baby sitters who testified that the house was messy when she baby sat for Mrs. Wallace in 1966.

Rather than the new hearing establishing that Mrs. Wallace was not a fit and proper mother, the testimony adduced at the hearing clearly established to the contrary. The most credible and relevant evidence was that given by Mr. and Mrs. Morten Hansen, who were the foster parents for the two Wallace boys from 1970 through 1972. They testified that when they returned the boys to the petitioner in compliance with the Family Court order, they did so with serious concern for the boys' future. They further testified that they have thus maintained a continued relationship with the Wallace family; and that on those regular occasions when they have visited her home they have always found it to be amply stocked with the necessary food, and that the boys' material, emotional and parental needs are amply provided for. The Hansens further testified that during the period of time the Wallace boys were in their care they developed a strong feeling of love and concern for the boys as though they were their own; and that at all times that they have visited the Wallace home, or on those occasions when they have entertained Mrs. Wallace and the boys in their own home, they have noticed there exists a like bond of love and concern between Mrs. Wallace and the boys. Furthermore, the boys appear to have made a complete and successful transition back with their mother, and

have readily involved themselves in the normal boy's activities.

The Court finds that it would be unduly traumatic and detrimental to the best interests of the children to subject them to a further court appearance; and the Court further finds that if they were to testify, all four of the children would expressly state that it is their desire to remain with the foster parents, Lhotans, and not return to their natural mother. This is the same desire that they had expressed to the Court at the time of the original hearing, and as presently expressed by them to the Law Guardian.

Therefore, after hearing and reviewing all of the testimony and evidence introduced at the re-opened hearing, the Court reaffirms its prior decision of June 27, 1975 granting the Writ of Habeas Corpus brought by the petitioner, Patricia A. Wallace, for custody of Cheryl, Patricia, Cathleen and Cynthia.

The Court further notes that in its original decision of June 27, 1975, it stated that:

"* * * though it is of critical importance that all of the children be afforded the opportunity to be reunited as a family unit, the Court concludes that it would be in the best interests of all concerned that this is accomplished in a staged or programmed return. The Court directs the respondents, Lhotans, to return the two youngest girls, Cathleen and Cynthia, within ten days of the date of service upon them of the order signed simultaneously herewith, to the natural mother, Mrs. Wallace, and thirty days thereafter the remaining two eldest girls, Cheryl and Patricia, shall be returned to the natural mother, Mrs. Wallace."

The Court also notes that in its prior decision provision was made for continuous service by the Department of Social Services, and for supportive

physiotherapy supervision to be rendered to Mrs. Wallace and the children to assist the parties during the transition and readjustment period.

Further, the Court notes that custody matters are often the subject of media coverage. However, in this long embittered custody matter, the children have been *unduly* and detrimentally exposed to the media in a calculated matter, while in the custodial care of the respondents, Lhotans. This conduct has continued since the time of this Court's order of July 8, 1975, and the Court has been advised that, without obtaining the approval of the Law Guardian, the children have recently been permitted to be interviewed by a reporter doing a story on custody matters in spite of the fact that some of the children have stated that because of past newspaper stories they have been embarrassed by classmates. Thus, this continuous detrimental conduct has dramatically added to the complexities and problems of the immediate return of the children to their natural mother.

Therefore, the Court directs the parties, including the respondent, Nassau County Department of Social Services, to submit to the Court within ten days of the order herein a proposal setting forth recommendations for an orderly and constructive return of the children to their natural mother, taking into consideration the expressed desire of all four girls that they remain together and the hostile atmosphere created towards the immediate return of the children to their mother; and that because of the stay of the court's prior order, the Department of Social Services has not provided the mother and children with the supportive physiotherapy for purposes of assisting them during the transition and readjustment period.

Short Form Order signed herewith.

J. S. C.

APPENDIX 10

**UNREPORTED STATE COURT DECISION
RE: NELSON/SHABAZZ CHILDREN**

Sec. 1051 F.C.A.

Child Protective
Form 10-14 (July,

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF Bronx

In the Matter of)	
Nelson Children)	
	)	Docket No.
A Child _____ under Sixteen (Eigh-	)	N-2383-87/74
teen) Years of Age Alleged to be)		
(Abused) (and) (Neglected) by	)	ORDER
	)	DISMISSING
Dorothy & Ronald Nelson	)	PETITION
Respondent(s))	

The petition of Comm. of Soc. Svce. under Article 10 of the Family Court Act, sworn to on 7/22/74, having been filed in this Court, alleging that the above named child _____ under sixteen (eighteen) years of age is (are) a (neglected) (abused) child _____ and that Dorothy & Ronald Nelson (is) (are) the (parent(s)) (person(s) legally responsible for the care) of said child _____; and

The matter having duly come on to be heard before this Court and the Court having found that the said (parent(s)) (person(s) legally responsible for the care) of said child _____ ((was) (were) present at the hearing and have been served with a copy of the petition) (every reasonable effort had been made to effect service of the petition upon the said (parent(s))

(person(s) legally responsible for the care) of said child _____ under Section 1036 or 1037 of the Family Court Act, and the following having appeared herein: C.C., Atty. for Resp. Mother, resp. mo., caseworker, L.G.

NOW, after examination and inquiry into the facts and circumstances of the case and after hearing the proofs and testimony offered in relation thereto, it is hereby

ADJUDGED that the allegations of the petition are not supported by a fair preponderance of evidence

ADJUDGED Children #1-5 to be discharged to respondent Mother; and it is therefore

ORDERED that the petition herein be and the same hereby is dismissed (and bail hereby is exonerated).

Signed at 1109 Carroll Place, New York, the day of June 24, 1975

THIS IS TO CERTIFY, THAT
THIS IS A TRUE COPY OF *the*
foregoing order MADE IN THE
MATTER DESIGNATED IN
SUCH COPY AND SHOWN BY
THE RECORDS OF THE
FAMILY COURT OF THE
STATE OF NEW YORK, WITHIN
THE CITY OF NEW YORK, FOR
THE COUNTY OF BRONX

Family Court Judge

Bronx
County

CLERK OF COURT

Date 6/24 1975

APPENDIX 11

UNREPORTED STATE COURT DECISION
RE: GANDY CHILDRENFAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CITY OF NEW YORK

In the Matter of the Review of the)	
Foster Care Status of)	
	)	Docket Nos.
ERIC and DANIELLE GANDY	)	K-2663/74S
	)	2664/74S
Pursuant to Section 392 of the)	
Social Services Law)	

Appearances: W. Bernard Richland, Corporation Counsel
of the City of New York, by
Dorothy G. Elfenbein, Assistant Corporation
Counsel,
220 Church Street
New York, New York 10013,
Counsel for the Commissioner of the
Department of Social Services.

Terry McGuire, Esq.,
1011 First Avenue,
New York, New York 10022,
Counsel for the Catholic Guardian Society.

Marcia Robinson Lowry and
Stephen Shapiro, Esqs.,
84 Fifth Avenue,
New York, New York 10011,
Counsel for Petitioners.

Thomas Burke, Esq.,
Burke, Burke and Burke,
1472 Broadway,
New York, New York 10036,
Law Guardian for the Children.

Yvonne Lawrence, Esq.,
11 Broadway,
New York, New York 10004,
Counsel for the natural mother.

OTTEN, J.: Eric Gandy, who is almost 12 years old (born 2/9/65), and his 8-½ year old sister, Danielle, have been in the same foster home for almost seven years.

The children were left by their mother with a Mrs. Jackson, a neighbor, and were delivered by her to the care of the Commissioner of Social Services in April, 1968. They were placed in foster care through Catholic Guardian Society with the foster mother. The biological mother had no contact with the children for over six years, and her whereabouts were unknown until recently when she responded to a notice in legal proceedings.

The foster mother is a 55-year old woman who is crippled by a condition described by a medical witness as arthritis in the lumbar region of the spine. Although her mobility is severely limited, she has been able to care for the children with the assistance of others, particularly a 21-year old grandson and an unrelated gentleman who has apparently established a stable relationship with her and the children. She also utilizes the services of the agency, Catholic Guardian Society, and its social workers.

Although the biological mother was well represented by able counsel at the hearing, she does not appear to be a plausible resource for the children now or in the future.

The foster mother would like to adopt the children. However, her physical disability requires that, in the best interests of the children, the services of the agency be available to her.

Foster care continued.

The Court refrains at this time from making any directive as to visitation, other than to state that visitation should be permitted only if the children are accepting thereof.

Notify parties and attorneys.

Dated: November 22, 1976.

Louis Otten
Judge of the Family Court.

APPENDIX 12

UNREPORTED STATE COURT DECISION

New York Law Journal
November 1, 1976
(page 1, column 6)

Appellate Division

First Department

IN THE MATTER OF THE REVIEW OF THE
FOSTER CARE STATUS OF LOUIS F. PURSUANT
TO SECTION 392 OF THE SOCIAL SERVICES
LAW.*

Decided October 21, 1976.

Before *Kupferman, J. P.; Lupiano, Capozzoli, Lane*
and *Nunez, J. J.*

Appeal from an order of the Family Court, New York County (Otten, J.), entered June 3, 1976, denying an application of appellants foster parents for pre-hearing disclosure of confidential records of respondents Catholic Home Bureau and New York City Department of Social Services. . . .

Lupiano, J. — This is a proceeding initiated by foster parents pursuant to Social Services Law Section 392 to review the foster care status of the child Louis F. wherein they seek an order directing the authorized agency to institute a proceeding to legally free such child for adoption, and upon a failure by such agency to institute such a proceeding, permitting them to institute such a proceeding. The Department of Social

*Excerpt

Services of the City of New York seeks to continue the child in foster care in that the agency is working toward a plan of discharge to the natural mother in the immediate future, but that it is contrary to the child's best interest to return him at this time. The foster parents moved for pre-hearing disclosure of certain records of the respondents relating to the child and his natural (biologic) parents which motion was denied by the Family Court with the brief and only observation that "(t)here is no sufficient showing of necessity to permit such disclosure."

Succinctly stated, the information sought by the foster parents is as follows: (1) all entries relating to visits between the infant and each of his natural parents, including entries relevant to reactions to such visits on the part of the foster parents, (2) all entries relating to plans of the natural parents to remove the children from placement and efforts by the agency to strengthen the relationship between the child and the natural parents, (3) all entries relating to home environment and the attitudes of the natural parents, (4) all entries relating to any history of mental illness, drug use, alcoholism, child neglect, child misconduct, criminal activity and contagious illness of either natural parent, (5) the names, addresses and birth dates of the natural parents, (6) all entries relevant to the child's present state of health and medical history, and (7) all entries relating to the facts surrounding the placement of the infant by the natural parents.

Opposition to disclosure voiced by the respondents Department of Social Services and Catholic Home Bureau, and by the natural mother may be summarized as follows:

There is no showing of necessity for access to this vast amount of material in that much of it is irrelevant or privileged; one of the foster parents was present

during the foster child's visitation with his natural mother; the cooperation by the natural mother with the authorized agency was developed and exists under the aegis of confidentiality and to disclose such material would be injurious to the relationship between said mother and the social worker with consequent hampering of the agency's work; the foster parents are engaged in a full-scale fishing expedition; the request for disclosure of plans by the agency and natural mother to strengthen the parental relationship should be denied as the instant proceeding is designed to evaluate the *current* situation and is not a permanent neglect proceeding, and the health of the infant is known to the foster parents.

The predicate urged by the foster parents for access to the information sought is advice by a case worker that the natural mother has suffered psychological difficulties which prevent her from regaining custody and is living with a man not her husband, and the absence of knowledge on the foster parents' part as to the biologic parents.

In *Matter of Carla L.*, 45 A.D.2d 375 (1st Dept., 1974), the issue of confidentiality of an authorized agency's case record warranted the procedural safeguard of *in camera* inspection by the Family Court. It was noted that

"Section 372 of the Social Services Law specifically enumerates a natural parent as among those to whom disclosure may be afforded. Although not so enumerated in Section 372 of the Social Services Law, a foster parent is given status as a party in a Section 392 foster care review proceeding and, as already stated, it is Section 392 which serves as the fountainhead for the rights of the parties within a foster care review proceeding. Consequently, an opportunity should be afforded a foster parent to obtain disclosure when appropriate in a foster care review proceeding.

“However, the different relationships inherent in the foster parent and natural parent require a different procedural method wherein and whereby such disclosure may be obtained by a foster parent. Recognition of these relationships and the absence of a foster parent from the designated classes to whom disclosure may be afforded in Section 372 of the Social Services Law mandate the conclusion that such disclosure may be had only upon a proper showing of necessity, coupled with *in camera* viewing by the Family Court. Initial disclosure by way of stipulation may be had, but only where court approval is obtained. Thus, the Family Court is of necessity involved *ab initio* with the disclosure process when disclosure is sought by a foster parent” (45 A.D.2d, 375, at 386-387). . . .

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

Supreme Court U. S.

FILED

FEB 11 1977

MICHAEL RODAK, JR., CLERK

76-180

HENRY SMITH, etc., *et al.*,

Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-183

BERNARD SHAPIRO, etc., *et al.*,

Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-5193

NAOMI RODRIGUEZ, etc., *et al.*,

Appellants-Intervenors,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

76-5200

DANIELLE and ERIC GANDY, etc., *et al.*,

Appellants-Plaintiffs,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLEES ORGANIZATION OF FOSTER
FAMILIES FOR EQUALITY AND REFORM, ETC., ET AL.**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

76-180 HENRY SMITH, etc., et al.,
Appellants-Defendants,

-against-

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76-5200 DANIELLE and ERIC GANDY, etc.,
 et al., Appellants-Plaintiffs,
 -against-
 ORGANIZATION OF FOSTER FAMILIES
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 et al., Appellees.

On Appeal from the United States
 District Court for the
 Southern District of New York

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BRIEF FOR APPELLEES ORGANIZATION
OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, ETC., ET AL.

Questions Presented

1. Was the District Court's decision, holding that the procedures authorizing the peremptory removal of foster children from foster homes without a prior hearing violate the due process rights of foster children, consistent with this Court's interpretation of the due process clause of the Fourteenth Amendment?
2. Did the District Court have jurisdiction to recognize the constitutional rights of foster children, and to fashion relief accordingly, when the only arguments in support of such rights were advanced by appellee foster parents?

APPELLEES' STATEMENT OF THE CASE

The named appellees in this civil rights class action are individual foster parents and an organization of foster parents. Together they filed suit on their own behalf and on behalf of the foster children for whom they have provided homes for a year or more, asserting that New York Social Services Law §§383(2) and 400, and 18 New York Code Rules and

Regulations §450.14,* the provisions governing the removal of foster children from foster homes, violate the due process and equal protection clauses of the Fourteenth Amendment.

The appellant state officials, Bernard Shapiro, et al., are responsible for the regulations and policies governing foster care.** Appellants Smith et al.

* Since renumbered as 18 N.Y.C.R.R. §450.10 Appendix 1a to appellant Rodriguez's brief ("R.A")

** The term foster care refers to 24-hour-a day residential care provided to a child outside his own home in either a foster family home, a group home or group residence, or a child-care institution. In New York state, such care may be provided by programs operated directly by a local public welfare district, or by programs operated by authorized voluntary child-care agencies, pursuant to New York Social Services Law §371(10). Such voluntary child-care agencies provide services for almost 90% of the children in foster care in New York City and for 21% of the children in foster care in the rest of the state. New York Temporary State Commission on Child Welfare, Final Report to the New York State Department of Social Services Title IV-B, Research and Demonstration: Barriers to the

(fn. cont'd on next page)

are responsible for the administration and supervision of the child-care system in New York City. Appellants Rodriguez et al., defendant-intervenors, represent natural parents whose children have been placed in the foster care system. Appellants Gandy et al. represent the interests of foster children as perceived by court-appointed counsel Helen Buttenwieser.*

Appellant public officials paint a self-serving portrait of the child-care system unsupported by either the record below or any other authority. Appellants Gandy and Rodriguez base their arguments on a description of the child-care system equally unsubstantiated by reality.

Appellants have described to the Court in their Statements of the Case the theories on which the New York foster care system are based. The facts concerning the named plaintiffs in this law suit far more accurately illustrate the reality of the New York foster care system, on which the three-judge court based its decision

(fn. cont'd from preceding page)

Freeing of Children for Adoption, hereinafter "Barriers," p. vii. They are subject to inspection, supervision and regulation by the State Board of Social Welfare and are almost entirely publicly funded. See Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974).

* After her appointment by the court, Ms. Buttenwieser filed an answer to the complaint and thereafter assumed the position of a party defendant. See Point III infra.

declaring the challenged procedures unconstitutional. Those facts show the manner in which vital relationships can be summarily interrupted at any time.

A. The Named Plaintiffs

1. Mrs. Smith and the Gandy Children

Mrs. Madeline Smith, a widow whose only child had died, became a foster parent under the supervision of Catholic Guardian Society, an authorized voluntary child-care agency, after making clear to the agency that she wanted to care for children who had no family of their own. (Appendix in the Supreme Court of the United States, hereinafter "A," p. 21a) At the time she applied to become a foster parent, Mrs. Smith explained to a worker at Catholic Guardian Society that she had arthritis, and was told that that would not present any problem. (Record, "R.", affidavit of Madeline Smith, ¶6, docket entry #2) Eric and Danielle Gandy, then four and two years old respectively, were placed with Mrs. Smith as foster children in February, 1970. It was undisputed that Danielle had never seen her biological mother and that Eric did not remember her.* In her affidavit in support of the application for a temporary restraining order, (R., docket entry #2) Mrs. Smith described the children and how they had changed since they had come to live with her:

"3... Both Eric and Danielle were very shy, frightened children when they first came home

* Opinion of the District Court, hereinafter referred to as "opinion," p. 6a of Appellants' Joint Appendix to Jurisdictional Statements, hereinafter "A.J.S."

with me four years ago. It took them a long time not to be frightened. I think if they were away from me now they would never get over it.

4. I love these children very much and if they were taken from me now, without there even being a reason, I would suffer very much, particularly since I know how scared and unhappy they would be.

. . . .

11. When Danielle came to my house she was very insecure and withdrawn. Within a short period of time, she became outgoing and was easily weaned from the bottle and toilet trained. Mine is the only home she has known and she is now a well integrated member of my family.

12. When Eric arrived in my home, he was five and could barely speak. He was easily frightened and seemed worried that he would have to leave. After several months he developed a close relationship with my grandson Stanley, whom Eric treats as a brother. He also became involved in church activities through Stanley and now seems secure in my home and in the neighborhood."

In 1974, a new agency worker assigned to the case observed that Mrs. Smith did, indeed, have arthritis and decided that Eric and Danielle should be removed from Mrs. Smith's home, despite the fact that the agency "considered Mrs. Smith to be an

excellent foster mother who had done wonders with Eric and Danielle." (R., affidavit of Marcia Robinson Lowry, ¶6, docket entry #2)

In February, 1974, the agency requested and received a letter from Mrs. Smith's physician stating that she was disabled and had to walk with a cane. (R., affidavit of Bracha Graber, ¶4, 6, docket entry #64) The letter also contained a statement, which had been crossed out, stating that Mrs. Smith was totally disabled (R. *id.*, at ¶7, 9) On March 29, 1974, an agency worker gave Mrs. Smith notice, pursuant to 18 N.Y.C.R.R. §450.14, that Eric and Danielle were to be removed from her home on April 24. The form she received, Exhibit A to plaintiffs' Second Amended Complaint (A., 37a) contained the mimeographed statement:

"To continue to plan for _____,
it is now in (his) (her) (their)
best interests to leave your
home on or about _____."

The only blank spaces on the form were for Mrs. Smith's name and address, for the children's names, and for the date on which the children were to be removed.

On April 24, 1974, a foster care review hearing was held in New York Family Court, a routine review of the foster care status of Eric and Danielle Gandy, required to be held every twenty-four months pursuant to New York Social Services Law §392.* Mrs. Smith appeared without

* For a discussion of §392, see Point II, infra.

counsel at the hearing. A representative from the Catholic Guardian Society also appeared, (R., affidavit of Bracha Graber, ¶14, docket entry #64) although the record does not reflect whether counsel for the agency was present. At the hearing, Mrs. Smith produced a letter from her doctor, dated subsequent to the letter from the same doctor which had described her as disabled. This new letter explained:

"[Mrs. Smith] is disabled in terms of employment but is able to do household tasks and is capable of taking care of children."
(R., Exhibit A to affidavit of Marcia Robinson Lowry submitted in support of application for temporary restraining order, docket entry #2)

After the hearing, the Family Court entered an order of disposition pursuant to New York Social Services Law §392(a) directing that foster care be continued. (R., affidavit of Bracha Graber, ¶15, docket entry #64) On May 2, 1974, a worker from the Catholic Guardian Society arrived at Mrs. Smith's home to remove the children. (R., affidavit of Madeline Smith, ¶5, docket entry #2) The children were not at home. At that point Mrs. Smith engaged counsel, who contacted the agency and asked that the removal be delayed until the facts were clarified. The agency director, James O'Neill, a named defendant below, acknowledged that there was no reason to believe that there was any danger to the children, and that the facts were unclear, but that the children would be removed from Mrs. Smith's home by May 10. The agency planned to move the

children to a small institution. (R., affidavit of Marcia Robinson Lowry, ¶3, 4, 7, 8, docket entry #2)

On May 9, 1974, Mrs. Smith filed this action on her own behalf and as next friend of Eric and Danielle Gandy. At 4:20 p.m. on that day, the removal of the Gandy children from Mrs. Smith's home was temporarily restrained by the federal court. (R., docket entry #2) That injunction was continued until dissolved during the course of this litigation, based on a representation that the agency had changed its plans about removing the Gandy children from their home with Mrs. Smith.

As of this date, Eric and Danielle remain in "temporary" foster care with Mrs. Smith under the supervision of a different Catholic Guardian Society worker than the one who had decided Eric and Danielle should be removed from their home. Mrs. Smith has initiated legal action to adopt Eric and Danielle, by filing a §392 petition asking that the court direct that the children be legally freed for adoption by Mrs. Smith.* The Family Court denied Mrs. Smith's application while noting:

"Although her mobility is severely limited, she has been able to care for the children with the assistance of others, particularly a 21-year-old grandson and an

* Until this new §392 proceeding was commenced and their biological mother received notice of that court action, Eric and Danielle Gandy had had no contact with their biological mother, and her whereabouts were unknown. (R.A. 117a)

unrelated gentleman who has apparently established a stable relationship with her and the children." (R.A. 117a)

Having refused Mrs. Smith's application for an order of disposition pursuant to Social Services Law §392(7)(c), the court entered an order pursuant to §392(7)(a):

"Foster care continued." (R.A. 117a)

Although Mrs. Smith is in the process of appealing this decision, the Gandy children remain in "temporary" foster care with Mrs. Smith after seven years, still not legally free for adoption. Should this Court reverse the decision below, they would once again be in jeopardy of the same arbitrary and peremptory removal from their home which was restrained by the federal court at the commencement of this litigation.

2. Mr. and Mrs. Lhotan and the Wallace Children

Plaintiff appellees George and Dorothy Lhotan joined this action after they received notice pursuant to the challenged regulation, 18 N.Y.C.R.R. §450.14, that the four sisters they had been caring for as foster children were to be removed from their home. Mrs. Lhotan testified that the agency told her the children were to be removed:

"Because we loved them too much. They loved us too much." (A. 302a)

Two of the four sisters, Cheryl and

Patricia Wallace, 12 and 11 respectively when they were joined as plaintiffs in this action, had lived with Mr. and Mrs. Lhotan for almost four years. Their younger sisters, Cathleen, nine, and Cynthia Wallace, eight, had lived with the Lhotans for almost two years after spending their first two years in foster care in another foster home. (A. 300a) Appellees Mr. and Mrs. Lhotan had been foster parents for the Nassau County Children's Bureau for a total of fourteen years and had cared for six other foster children, all of whom had been returned to their biological parents without any objections by Mr. and Mrs. Lhotan. Mrs. Lhotan testified that the reason she had not been concerned about the other foster children leaving her home and going back to their biological parents was:

"Because they went back happy."
(A. 301a)

With the Wallace children, however, Mr. and Mrs. Lhotan felt differently.

"Q. Mrs. Lhotan, you have had foster children before. Why are you objecting in this instance to having the children removed?

. . .

A. Because there was never --- if there were just a few visitings. The mother never came to visit these children." (A. 303a)

Mr. and Mrs. Lhotan were summoned to the Nassau Children's Bureau in June,

1974, by an agency supervisor.* Mrs. Lhotan testified:

"When I got there, she had given me a paper to sign which I had objected and she also said that they are going to be removed from the home July 9th. . .

. . .

She [the supervisor] had told me that she had already discussed it with the staff, that even if we didn't sign, the children would still be dragged out of our home and I had asked them how many are coming for the children and they said, one won't be enough. There has to be a few of them coming." (A. 304a)

The paper which Mrs. Lhotan was asked to sign was the notice of her right to a conference pursuant to the state regulation, 18 N.Y.C.R.R. §450.14, which the court below found unconstitutional. The form document contained blanks only for the foster parents and child's names, the foster parents' address, and the date of the removal. The printed form contained no reason for the planned removal, and was headed "Agreement to Remove Child From Foster Family Care." (R., Exhibit A to Order to Show Cause, docket entry #16)

Cheryl Wallace, the oldest of the four sisters, testified about her partic-

* The most recent \$392 hearing concerning the Wallace children had been in 1972.
(A. 304a)

ipation in the agency decision to remove the Wallace girls from the Lhotan home.

"Q. Has anyone from the Children's Bureau asked you whether you want to leave? A. No.

Q. Has anyone asked your sisters, if you know? A. No.

Q. Do you have an opinion about whether you want to leave or not?

. . .

A. Yes.

Q. Do you want any body to ask you? A. Yes.

Q. Why is that? A. Because we were supposed to be taken away from our foster parents without any say.

Q. Do you consider it important to have a say in whether you go or not? A. Yes, I do." (A. 305a)

The Wallace children's biological mother had visited them infrequently while they were in foster care, and they expressed strong negative feelings and an "aversion" to be returned to her. (R.A. 101a) The Nassau Children's Bureau planned to remove all four of the Wallace children from the Lhotan home on July 9, 1974. The Children's Bureau planned to return only the two younger children to their biological mother; the two older children were to be sent to live in another foster home. (R.,

affidavit of Dorothy Lhotan, docket entry #16)

On July 8, 1974, the planned removal of the four Wallace girls in accordance with existing procedures was temporarily restrained by an order of the District Court. (R., docket entry #16) The restraining order was continued and the removal of the Wallace children without a prior due process hearing enjoined pending a determination of the motion for a preliminary injunction. (R., docket entry #33) On August 29, 1974, Patricia Wallace, the biological mother of the children, filed a writ of habeas corpus in the Nassau County Supreme Court seeking immediate custody of all four children. Since the question of whether these children should be removed from their foster home would now be decided with full due process by virtue of the filing of the state court action, the District Court dissolved the prior injunction.*

* In the State Supreme Court, counsel for the foster parents made a successful application to the court for the appointment of separate counsel to represent the foster children on the substantive issue of the children's custody. The Supreme Court granted the writ and ordered that the children be removed from their foster home, that the two younger children be returned immediately to the

(fn. cont'd on next page)

3. Mr. and Mrs. Goldberg and Rafael Serrano

The third set of named plaintiffs, Ralph and Christiane Goldberg and their foster child, Rafael Serrano, had lived together for five years when they were joined as plaintiffs in this action. Rafael was six years old when he came to the Goldberg home. As the District Court found:

(fn. cont'd from preceding page)

biological mother, and that the two older children be sent to a neutral foster home. (R.A. 90a, 108a) The Appellate Division affirmed the Supreme Court decision, citing a decision-making standard that had been applied most recently in Bennett v. Jeffreys, 51 A.D. 2d 544, 378 N.Y.S.2d 420 (2d Dept., 1976). Wallace v. Lhotan, 51 A.D.2d 252 (2d Dept. 1976). Approximately six months later, the Bennett case, on which the Wallace decision was based, was reversed by a unanimous Court of Appeals, Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976). See also In re Sanjivini K. v. Usha K., ___ N.Y.2d ___, (N.Y. Ct. of Apls. #594, decided Dec. 20, 1976). In light of New York's changing substantive law on the decision-making standard in custody disputes, it is at least questionable whether the Wallace case would be decided the same way today. In any case, the standard to be applied at any hearing held pursuant to the decision of the District Court below would be the prevailing state law standard at the time. See Statement of the Case, Point D, infra.

"Prior to his placement in the Goldberg home, Rafael had lived with a succession of foster families after having been abused by his natural parents during the time that he remained with them. Although the Goldbergs have been repeatedly told that they have done an excellent job in providing a healthy environment in which Rafael might grow and develop they now fear, on the basis of various unofficial statements, that the Bureau of Child Welfare intends to remove Rafael and place him with his aunt." (A.J.S. 7a)

As Mrs. Goldberg testified, "It's like a sword hanging over our heads." (A. 297a)

All of these foster families are, indeed, representative of foster families whose family relationships are subject to peremptory termination under the statutes and procedure declared unconstitutional by the decision of the court below.

B. The Foster Care System in New York

Appellant public officials, natural parent-intervenors and court-appointed counsel for the foster children have portrayed a misleading picture of the foster care system in New York. Their description comports only with the platitudes of the theoretical basis for the system; it has little to do with the reality in which

foster children find themselves trapped.*

The theory is, indeed, that foster care is a temporary arrangement, designed to provide substitute care for the children of parents, usually poor parents, who are unable to care for their children at a particular time. Theoretically, children either return to their parents once the problems which precipitated the foster care placement are resolved, or a

* In summarizing the findings of a study of children whose cases were reviewed pursuant to New York Social Services Law §392, a court review enacted because of legislative concern over the numbers of children growing up in "temporary" foster care, one social scientist has noted:

"It is of course reasonable to ask why the courts were seen. . . as a necessary instrument for protecting the rights of children when agencies have long voiced their responsibility for such protection. Clearly the field's verbal assurances and its long history of service to children do not meet the public's demand for accountability in an area where the needs of the children are so urgent. . ." Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211, 244 (April 1975).

decision is made that the parents will not be able to ever resume care, parental rights are terminated and the children are moved into adoptive homes. It is only during this temporary period, theoretically, that the children remain in foster care.

Such a characterization is bold misrepresentation and an attempt to perpetrate a cruel hoax on foster children in the state of New York. Study after study in recent years* has criticized foster care precisely because of what the record in this case so simply demonstrates: rules and procedures concerning foster care are based on a theory that has no basis in fact. The District Court, after hearing evidence and reviewing lengthy expert witness depositions, found:

"the average child placed in foster care remains within the system for approximately 4 1/2 years." (A.J.S. 8a, see also fn. 5 to opinion, 18a)

More than 60 per cent of the children in foster care are in individual foster homes, rather than group or institutional settings and these children are likely to remain in foster care longer than the norm and are less likely to have any contact with their natural parents.

* "[T]he existing foster care system is not, in fact, a temporary one." Wald, State Intervention on Behalf of "Neglected" Children; Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stanford Law Review 625, 626 (April 1976).

(R., Research Report on New York State Foster Care, Time Spent in Care by Children Served in the New York State Foster Care Program 1973, New York State Department of Social Services, p. 1, Exh. B to Catalano dep., admitted at p. 5) The tragic fact is that children who remain in foster care for a year or more, the only children affected by the decision of the court below, are not likely to return to their biological parent* and are not likely to be adopted.** The fact that children do not go back to their natural families is not surprising considering the reasons children enter placement in the first place. Overwhelmingly, placement occurs because of the mental illness of the parent, or

* Prof. David Fanshel, an expert witness for defendant-intervenor Rodriguez, conducted a five year longitudinal study of selected children who entered the New York City foster care system in 1966 (A. 182), hereinafter referred to as the Fanshel study. He excluded from the study children for whom foster care was truly temporary, that is, children who entered and left within 90 days (A. 182a) Even so, he found that "the probability of a foster child being returned to his biological parents declined markedly after the first year in foster care." (A.J.S. 18a, fn. 5)

** Of the children in the Fanshel study only 4.6 (20 out of 642) were discharged to adoption during the five year study period. Fanshel, Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study, 55 Child Welfare 143, 145 (March 1976) The number of children in foster (fn. cont'd on next page)

neglect or abandonment by the parent.*

However, a child who enters foster care because of the parent's physical illness is

(fn. cont'd from preceding page)

care who are being adopted declined by more than 50% between 1969 and 1974. Lash and Sigal, State of the Child: New York City, (1976) p. 72.

* "By far the most common conditions prompting admission to foster care are neglect and abandonment of dependent children by their parents." (R., Research Report on New York State Foster Care, Time Spent in Care by Children Served in the New York State Foster Care Program 1973, New York State Department of Social Services, p. 13, Exh. B to Catalano dep., admitted at p. 5, docket entry #148)

An analysis of the key factor resulting in the placement of the children in the Fanshel study showed that the two most prevalent factors were the parent's mental illness, the majority of situations involving hospitalization of the mother in a psychiatric facility and severe neglect or physical abuse. Jenkins and Norman, Beyond Placement, pp. 13-14 (1975)

"Whether large groups of these children [in foster care in New York] ever had any kind of secure family situation is in doubt. The reasons for placement given in children's case histories. . . tell an eloquent story of family crisis and conflict. . ." State of the Child, supra, at p. 61.

to leave foster care more rapidly, more than half in the Fanshel study being discharged within the first year. (Fanshel, The Exit of Children From Foster Care, 50 Child Welfare 65, 73 (Feb. 1971))

Thus both the record in this case and studies relevant to the New York foster system provide ample evidence that the system as it now operates is not a system of temporary care; children are not moving quickly back to biological parents or into adoption. They are growing up in foster care.* And while they do so, they are likely to be shifted from one foster care setting to another. For example, of 1,505 children reported removed in 1973-74 from foster homes in which they had lived for from one through four years, only 202 were removed for a return to their biological parents and 103 were removed for placement in an adoptive home. (R., state defendants' answers to plaintiffs' interrogatories dated Aug. 12, 1974).

* According to the Fanshel study, the children who were the youngest at the time of entry in foster care were disproportionately likely to remain in care. Of those who entered when they were under two years of age, one-half were still in placement at the end of five years. Fanshel, Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study, supra at p. 146.

The record in this case reflects that almost 60 per cent of the children in the Fanshel study had experienced more than one placement, and almost 30 percent had been moved three or more times.*

* A, p. 124a, 189a.

Another recent New York study of children in care at least two years reported:

"Observations of the foster care system also underscored the amount of movement of children once they were placed in foster care. Children moved from institutions to foster homes (usually older children) and from one foster home to another. Only 41% of the children experienced one placement only . . . [S]uch a system must communicate and reinforce a sense of impermanence to the children within it." Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211, 240 (April 1975)

For a discussion on the frequency of multiple placements of children in foster care and its harmful impact see Wald, State Intervention on Behalf of "Neglected" Children; Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, supra at pp. 645, 646, 669-671. "The frequency of multiple placements is perceived as one of the most severe deficiencies of the existing system." id at p. 646.

Having suffered the initial trauma of the disruption of their biological family, a disruption likely to be even more traumatic when accompanied by neglect, abuse or the mental illness of the parent, these children are being denied even the stability of remaining in long-term foster homes, free from the arbitrary and peremptory disruption.*

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- * Appellants posit a situation in which the foster family is an alternative to an adoptive family. This need not be the case at all. If a foster family relationship is allowed to flourish and deepen, free from ill-considered and unnecessary dissolution, that foster family is the most likely adoptive resource for the child. See, e.g., the description of appellee Smith's efforts to adopt the Gandy children. In recognition of this fact, the state legislature has enacted a subsidized adoption program, New York Social Services Law §398.6(k) to enable suitable foster parents with low incomes to adopt their foster children and continue to receive some financial aid in lieu of foster care payments.

C. The Procedures for Removing Children From Foster Homes Declared Unconstitutional by the Court

When a foster child is placed by an authorized agency in an individual foster family home, the agency may remove the child at any time "in its discretion. . .".* This is true regardless of the length of time the child has lived in the foster home, (A. 291a) and regardless of whether the child is being moved to another foster care setting of any kind, or whether the child is being returned to a biological parent.

The initial decision to remove the child is made by a worker who need not have any special training in social work or psychology (A. 132a) and, who typically is at least the third or fourth worker on the case.**

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- * New York Social Services Law §§383(2), (R.A. 1a).

- ** The high rate of worker turn-over among social workers is well-recognized. See Shapiro, Occupational Mobility and Child Welfare Workers: An Exploratory Study, 53 Child Welfare 5 (Jan. 1974). As part of his study, Prof. Fanshel notes a turn-over so high that within two and a half years 70 percent of the foster families had experienced a change in social workers. Fanshel and Grundy, Foster Parenthood: A Replication and Extension of Prior Studies, p.7, (April 1971).

All the foster families named as plaintiffs in this case had experienced several changes in social workers. The
(fn. cont'd on next page)

The decision to remove the foster child from what may be the only family he or she has ever known need not be discussed by the worker with the foster child, regardless of the child's age.* The decision and the basis for it may, however, be discussed by the worker with the

(fn. cont'd from preceding page)

decision to remove the Gandy children from their home with appellee Madeline Smith was made by a worker new to her case and abandoned when a new worker was assigned subsequent to the commencement of this action. Appellee Dorothy Lhotan testified that during the four years the Wallace children were in her home, she had been supervised by three different case workers. (A. 302a) Appellee Christiane Goldberg testified:

"Every worker had essentially a different plan. Every time we change workers, they had a different opinion. Even the last worker first said he wasn't going to move him and then he said he was." (A. 297a)

- * Twelve-year-old Cheryl Wallace testified that neither she nor her sisters had been asked whether they wanted to leave their foster home with appellees Mr. and Mrs. Lhotan prior to the time that the Nassau Children's Bureau notified the Lhotans of the removal decision. (A. 305a)

individual in the social services department who will later conduct the only pre-removal review available.*

The written notice sent to the foster parents contains no information about why the child is to be removed. At most, it may contain the printed statement that the removal is "in the child's best interests." See A. 37a, 134a, 281a. In some circumstances, the agency may decide to completely withhold from the foster parents the real reason for the removal decision. In other circumstances the reason for the removal decision, or some portion of the reason, may be communicated informally to the foster parents by an agency worker. (A. 281a, 283a, 288a) Foster parents who wish to object to the removal may, under the challenged regulation,

"request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed." 18 N.Y.C.R.R. §450.14 (R.A. 2a)

- * The director of the Nassau Children's Bureau testified that the person holding the hearing provided by 18 N.Y.C.R.R. §450.14 would almost certainly have participated in the initial decision to remove the child. (A. 132a, 135a)

At the conference, the District Court found that the foster parents

"may not present or cross-examine witnesses, nor may they inspect the agency files even if records contained therein formed the predicate for the administrative decision. Yet, despite these handicaps, the burden is upon the foster parents to submit 'reasons why the child should not be removed.' The agency, by contrast, has no countervailing obligation to provide an articulated rationale for removing the child. N.Y.C.R.R. §450.14. There is evidence in the record which indicates that rarely, if ever, do these pre-removal conferences result in the reversal of the initial decision." (A.J.S. 4a-5a)

Testimony in the record makes explicit that the conference is considered more an opportunity to explain the removal decision to the aggrieved foster parents than an independent review of the initial decision.*

* "The functions of the conference is to give the foster parents every opportunity to present their views and reasons as to why they disagree with the agency's decision to remove the child and I would like to add also. . . if both the foster parents and the agency were in agreement, it would be a further opportunity for the department to interpret to the foster parents why the department had made that plan." (A. 135a)
(fn. cont'd on next page)

After the conference has taken place, §450.14 requires that a decision be made and a written notice sent to the foster family within five days. Three days thereafter, if the decision is adverse, the child may be removed from the foster home.

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Subsequent to the initiation of this action, the New York City public child welfare agency, which is called Special Services for Children, modified its practices under §450.14 "in recognition that there are considerations of due process which should be protected in removal of children from foster family homes. . ." when a child is being removed to go to another foster care setting. (R.A. 54a) Special Services for Children continues to conduct conferences in which a child is to be returned to the biological parent in accordance with its former general practices, pursuant to §450.14:

"Q. Would you characterize the [conference held when the child is to be removed for a return to the biological parent] as more a time to explain to the foster parents why the child or children are being removed?

A. Yes." (R., dep. of Retta Friedman, p. 22, docket entry #89)

Special Services for Children interpreted §450.14 as mandating no more than an explanatory conference at which agency representatives were not present, even when the child was to be moved to another foster care setting, See R., id. at pp. 19-21.

A full administrative review, a state-conducted fair hearing run in accordance with 18 N.Y.C.R.R. §358, is available to review the decision reached at the conference, see New York Social Services Law §400(2), §450.14(c),* but that review is available only after the child has been removed from the foster home. The fair hearing is available regardless of whether the child is being removed from the foster home to be placed in another foster care setting or to be returned to a biological parent.**

D. The Remedy Ordered by the District Court

The District Court held that "the pre-removal procedures presently employed by the state are constitutionally defective." (A.J.S. 10a) In a ruling limited to children who have lived in a foster home for one year or more, Judge Lumbard, writing for the court, ruled that

"before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all

* 18 N.Y.C.R.R. §450.14(d), R.A. 3a.

** The state official responsible for supervising §400 hearings testified that "most involve cases where the agency has determined to remove the child and return the child to its natural parent. . ." A. 144a

concerned parties may present any relevant information to the administrative decisionmaker charged with determining the future placement of the child." (A.J.S. 10a)

As recognized by the court, a hearing serves two crucial purposes: it "dispels the appearance and minimizes the possibility of arbitrary or misinformed action." (A.J.S. 10a) The court summarized the constitutional defects of the present pre-removal conference as follows:

"the foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate." (A.J.S. 12a)

Furthermore, the court found that the availability of a post-removal "fair hearing" exacerbated rather than cured the constitutional violation found to exist. (A.J.S. 13a)

In examining the pre-removal procedures promulgated by the New York City public agency, Special Services for Children, during the course of the litigation, the court found "significant improvement" over the unconstitutional pre-removal conference, post-removal administrative hearing provided by the challenged regulation and statutes. However, even that attempt still presented constitutional deficiencies in the court's view:

Thus:

1. The review would only be provided upon request by the foster parent, rather than as a matter of course to protect the child's right "to avoid arbitrary dislocations;" (A.J.S. 15a)

2. The new procedure did not apply in those instances in which the child was being removed for a return to a biological parent, a distinction which ignored the fact that the child's "best interests" would always be promoted by a well-informed decision; (A.J.S. 16a)

3. The existence of New York City's pre-removal hearing and the state's post-removal hearing mandated by 18 N.Y.C.R.R. §450.14 was duplicative and contrary to the child's right to a speedy and final decision; (A.J.S. 16a)

4. The New York City review procedure limited participation to the foster parents and the agency representative, instead of permitting the biological parent and the child an opportunity to be heard as a part of the child's right to a well-informed decision. (A.J.S. 16a)

While setting forth these principles, the court carefully refrained from formulating any specific procedures which would be constitutionally mandated:

"we believe the sounder course is to allow the various defendants--state and local officials--the first opportunity to formulate procedures suitable to their own professional needs and compatible with the principles set forth in this opinion."*

The court's final order** declares New York Social Services Law §383(2) and 400, and 18 N.Y.C.R.R. §450.14 unconstitutional as applied, but refrains*** from mandating the constitutionally required procedure for the hearings beyond

"notice and hearing at which the foster parents, the foster child and the biological parents may

* A.J.S. 17a.

** A.J.S. 36a-37a.

*** Appellants' repeated contentions that the court mandated full dress adversary hearings is flatly contradicted by the court's decision and order. The court held that the defendants should have the first opportunity to develop procedures consistent both with the constitutional guidelines in the decision and with professional knowledge. Moreover, the court specifically stated that it was not holding that "a trial-type hearing. . . is constitutionally requisite."

present any relevant information to the administrative decision-maker. . . ."

The court's order further required that a disinterested adult be appointed to represent the child at such a hearing under certain circumstances, and that defendants promulgate appropriate procedures in accordance with the opinion and order.**

Judge Lumbard, writing for the court, made it clear that the District Court ruling was a procedural one only, setting forth constitutional principles and guidelines to govern the decision-making process. The court noted that New York decisional law contained standards*** for determining the custody of children. A constitutionally-mandated hearing at which the standards could be applied would not, the court noted explicitly, disturb that "local judgment." (A.J.S. 11a)

* A.J.S. 37a.

** A.J.S. 37a.

*** Appellants' doomsday forecasts that the court's decision will serve to destroy biological families and award custody of the children of the poor to their foster families is without basis or support, other than appellants' assertions about general malfunctions in the foster care system and society in general. Whether or not these assertions are true, they are irrelevant to the very narrow issue decided by the District Court.

SUMMARY OF ARGUMENT

Appellants have uniformly couched their arguments to this Court based on a patently misleading characterization of the nature of the New York foster care system. See Appellees' Statement of the Case, supra. Appellants argue that children being removed from foster homes in which they have lived for a year or more usually are bound for either their biological family's home or an adoptive home. Therefore, appellants argue, the District Court opinion not only fails to protect any cognizable constitutional interest, it also serves to thwart the state's policy, and constitutional obligation, to protect the biological family unit, and the state's interest in providing children with substitute permanent homes through adoption.

Appellants' legal analyses flow from, and their logic and relevance are dependent upon, these false and unsubstantiated premises.

Appellees readily concede, and have throughout this litigation, that the biological family unit has been and should be afforded constitutional protection, and should be disrupted only when absolutely necessary. Appellees further agree that the foster care system in New York is intended to provide only temporary care to foster children, until they can be reunited

with their biological family or provided with a substitute permanent family through adoption. However, appellees do not accept the freedom shared among the appellants to ignore either the facts concerning their own situations, or the evidence contained in this record.

The biological families of the children in this lawsuit have already been disrupted for at least a year; in most instances the biological parents are strangers to the children.

Foster care in New York is not a temporary situation for most children. Once they have been in foster care for a year or more, foster care is likely to become a long-term arrangement.

Appellees' legal arguments will be based, therefore, on the facts concerning their foster care situations, and the evidence in this record upon which the three-judge District Court based its opinion.

The District Court held that once the biological family has been disrupted and a child has been a part of a foster family for a year or more, a protected interest in that relationship has been created with which the state may not constitutionally interfere arbitrarily or peremptorily, and that existing procedures do not provide even minimal due process protection for that interest. Therefore, the District Court ordered the defendants to formulate procedures to insure that a child not be removed for a foster home without notice and a hearing at which foster parents, the

foster child and the biological parent may present any relevant information to an impartial decisionmaker.

Appellees maintain that the District Court opinion was correct and should be affirmed by this Court. Decisions regarding the lives of children are admittedly subjective, based on non-quantifiable information from a variety of sources, and usually involve disputed facts. However, it is in the interests of all parties* that such decisions be made on the basis of all available information and as fairly, carefully and expeditiously as possible.

* These parties include the state, charged with the responsibility for protecting the child; the biological parent, who regardless of ability to perform a caretaking function can nevertheless be presumed to have vital concern for the child's well-being; the court-appointed representative for the child; and the foster family, parents and child.

POINT I

THE DISTRICT COURT OPINION
CORRECTLY RECOGNIZED A
CONSTITUTIONALLY PROTECTED
INTEREST REQUIRING DUE
PROCESS PROTECTION.

The opinion of the district court below is a narrow, limited procedural holding: that the decision to remove a child from a foster home in which he or she has lived for more than one year is a critical decision affecting a constitutionally protected interest and relationship which may not be made without a prior hearing at which all parties have an opportunity to be heard.

Whether disruption of a child's relationship with a foster family is viewed as a withdrawal of a benefit conferred by the state or as an infringement of the child's inherent right to liberty, the state may not act arbitrarily, peremptorily or without due process of law. The three-judge district court ruled that

"it is by now well-settled that children are 'persons' within the meaning of the Fourteenth Amendment whose rights are entitled to protection against state abridgement. In *re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Gross v. Lopez*, 419 U.S. 565 (1975). Foremost among those rights, as the Supreme Court has repeatedly held, is the right

to be heard before being 'condemned to suffer grievous loss,' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)." (A.J.S. 10a)

A. The Nature of the Protected Relationship

The District Court recognized, based on an impressive array of evidence and on the basis of "our common past"* that

"the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment. This is especially true for children such as these who have already undergone the emotionally scarring experience of being removed from the home of their natural parent." (A.J.S. 11a)

As the court noted,

"Neither defendants nor intervenors dispute the strength of the emotional ties binding plaintiffs and their foster children or the loss that will be felt if those ties are severed." (A.J.S. 7a)

* A.J.S. 11a.

The District Court found that the basis for the right to be afforded constitutional protection was obvious: "the harmful consequences of a precipitous and perhaps improvident decision to remove a child from his foster family are apparent."* They are also well-documented in the record below.**

Dr. Stella Chess, head of the department of child and adolescent psychiatry at the New York University Medical Center, the author of five

* A.S.J. 10a-11a.

** Prof. Fanshel, who found no statistically significant correlation between the number of times a child was moved and the child's successful development, readily conceded that his study was not designed to study such phenomena in depth. His opinions were also shaped, inevitably, by his view that a functioning biological parent has an absolute right to determine when to resume custody of a child. (R., dep of Prof. Fanshel, pp.62,125-126, 180, docket entries # 93,94).

psychiatry texts and a practicing child psychiatrist for 32 years, testified that significant emotional attachments were possible between foster parents and child, identical to the attachment that could exist between biological parent and child, and that the existence of a biological relationship was not the key determinant. (A. 121a). See also testimony of Dr. Marie Friedman, A. 263a-265a.*

* Dr. Albert Solnit, Sterling Professor of Pediatrics and Psychiatry at Yale University, director of the Child Study Center in New Haven, Conn., and president of the International Association for Child Psychiatry and Allied Professions, described the development of the foster family relationship when it exists for a period of time which is lengthy when judged by a child's sense of time:

"These children feel that this is my mommy and my daddy, foster parents, and this is their home and they build their lives on the basis of the daily contact, the daily attachment, the daily feelings of love and sense of protection, the sense of feeling wanted and feeling an unqualified commitment from the parents. These are the criteria for establishing what we call the psychological parent that has been established and is maintained." (A. 214a).

Three distinguished psychiatrists specializing in child and adolescent psychiatry, all with experience treating foster children, attested to the devastating impact of an unnecessary removal of a child from a foster home in which the child had lived for a year or more, even if the child were being moved to new living situation which was objectively desirable.* Dr. Chess testified:

* Appellant Rodriguez argues in her brief, Point III, that the class certification was improper because the named plaintiff foster children are not completely representative of all foster children within the certified class. Complete representativeness is not required by Rule 23, Fed. R. Civ.P. Moreover, contrary to appellant's assertion, two of the plaintiff foster children, Cathleen and Cynthia Wallace, had been in their foster home less than two years. Cheryl, Cynthia and Cathleen had seen their biological mother only months before being joined as plaintiffs in this action. (R. affidavits of Dorothy Lhotan and Cheryl Wallace, dated July 3, 1974, paragraphs 8 and 9, and 6, respectively, submitted in support of Order to Show Cause for temporary restraining order, docket entry # 16).

Appellant Rodriguez's argument is, once again, based on a confusion between the decision-making process and the decision-making standard.

"Repeated removal of a child from one situation to another, even if they are basically good situations ... are highly likely to deprive the child of an ability to form close relationships, to internalize a sense of right and wrong of rules, and to develop a real concept of empathy and give-and-take of human relationship of a meaningful nature." (R. dep of Dr. Chess, p.26, docket entry #135).*

* "[I]f the child is taken out of the home suddenly for a long period of time beyond their tolerance of being able to remember or to feel the security of the previous parents, it has a devastating effect.

"We have studied child after child in which this devastation registered, a loss of developmental progress that can be quantified within the area of speech, in the area of motility, in the areas of skills and competence." Testimony of Dr. Solnit, A. 220a. See also testimony of Dr. Solnit, A. 213a-215a, 224a-225a; Dr. Chess, A. 122a-123a, 124a, 125a, 127a, deposition at pp. 57,58,60 (R., docket entry #135); testimony of Dr. Friedman, A. 265a-268a.

Judge Edward Lumbard, writing for the three judge court, found it significant that even defendant-intervenors' witness, Prof. David Fanshel, testified "as a professional," that he would be against capricious movement of children,"* and the court noted, "the requirement of a hearing is designed to insure no more."**

The decision by the court assiduously avoids comment on the standards which should be utilized at the constitutionally mandated hearing. While noting the debate concerning what weight should be given to the existence of a psychological family relationship, as discussed in Beyond the Best Interests of the Child, by Drs. Joseph Goldstein, Anna Freud and Albert Solnit (1973), the court correctly holds that the decision-making standard, as compared to the procedure involved in a hearing, is a local judgment,** to be determined

* A.J.S. 11a.

** Id.

*** The constitutionally-mandated hearing has acquired even greater importance in New York since the ruling of the three-judge court. At the time of the District Court's decision, the law in New York was, indeed, clear in a custody dispute between a biological and foster parent: "in the absence of abandonment, formal surrender for adoption or demonstrated unfitness, the 'primacy of parental rights may not be ignored.'" Therefore, Judge Lumbard's opinion (fn. con't on next page)

by the state.* The district court was not attempting to tamper with such local judgments, as appellants' somewhat

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explained, when a child was to be removed for a return to a natural parent the hearing would be limited to such issues as whether the biological parent had been visiting the child and whether the parent was presently fit.

New York law has now been made substantially less clear, and perhaps reversed. Appellants cite Bennett v. Jeffreys, 40 N.Y. 2d 543, 387 N.Y.S. 2d 821 (1976), see, e.g., brief of appellant Rodriguez p.68, but fail to mention that the unanimous Court of Appeals created a substantial exception to the then-prevailing New York rule, and reversed a custody award made to a fit biological parent who had neither abandoned nor surrendered her child for adoption. Bennett held that the primacy of the biological parent's right would become secondary when weighed against such "exceptional" circumstances as "persisting neglect ... and unfortunate or involuntary disruption of custody over an extended period of time." Bennett v. Jeffreys, supra, 387 N.Y.S. 2d at 824. In a memorandum decision written three months later, the Court of Appeals acknowledged that Bennett had "overturned" the existing "ratio decidendi." Matter of Sanjavini K. v. Usha K., supra.

* A.J.S. 11a.

The District Court was not attempting to tamper with such local judgments, as appellants somewhat hysterically predict.*

The hearing mandated by the District Court is designed solely to ensure that placement decisions are based upon a fair and careful evaluation of all the relevant information. Thus, rather than interfering with the standards New York has established for determining the placement of foster children, the decision merely seeks to ensure that those standards are applied as carefully and as accurately as possible.

B. The Constitutional Basis for the Hearing Mandated by the District Court

The constitutional basis for the hearing mandated by the District Court derives both from this Court's interpretation of the nature of liberty** protected by the due process clause of the Fourteenth Amendment and from the individual's right to be free from arbitrary state interference or withdrawal of a state-provided benefit. The right to procedural due process of law does not depend on whether it is the individual's right or his privilege which is being subjected to arbitrary state intervention. Shapiro v. Thompson, 394 U.S. 618 (1969), Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

* See, e.g. brief of appellant Rodriguez, pp. 72, 85; brief of appellant Gandy, pp. 17-18; brief of appellant Smith, pp. 17-19. But see A. 293a.

** For judicial recognition of the constitutional protections which should be accorded the foster family relationship, see James v. McLinden, 341 F.Supp. 1233 (D. Conn. 1969).

As this Court recently stated, in Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed. 2d 18, 32 (1976):

"The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Armstrong v. Manzo, 380 U.S. 545, 552 (1965)."

1. The Liberty Interest

Foster children who have lived in a foster home for a year or more have a sufficient liberty interest in the foster family relationship to have that relationship protected from arbitrary disruption by the due process clause of the Fourteenth Amendment. The interest is based on the rights encompassed within the First, Ninth and Fourteenth Amendments.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572 (1972). See also Goss v. Lopez, 419 U.S. 565 (1975); Palko v. Connecticut, 302 U.S. 319 (1937); Griswold v. Connecticut, 381 U.S. 479 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Huntley v. Community School Board of Brooklyn, 543 F. 2d 979 (2d Cir. 1976).

This Court has long recognized the importance of the family relationship as a cornerstone of the evolving interests, rights and liberties which the Bill of Rights was intended to protect. See e.g., Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Increasingly, looking more to reality instead of theory to determine exactly what interests were in jeopardy, this Court has protected such rights and relationships, regardless of whether or not they developed within the confines of traditional, statutorily-defined structures, Stanley v. Illinois, *supra*, 405 U.S. at 650; Levy v. Louisiana, 391 U.S. 68 (1968); In re Gault, 387 U.S. 1 (1967).

Thus, in extending due process rights to the father of illegitimate children, even though the state of Illinois did not recognize him as a legal parent, this Court recognized that it was the emotional and psychological content of a parent-child relationship, and not its legal status, that gave rise to a protected constitutional relationship. Stanley v. Illinois, *supra*, 405 U.S. at 650.

After a year or more of living together, foster children and their foster parents can develop emotional ties with each other which may be as "warm, enduring and important as those arising within a more

formally organized family unit." Stanley v. Illinois, *supra*, 405 U.S. at 652. The child's right to have the relationship free from arbitrary state disruption cannot be made dependent on the status of those who produced or seek to raise him. Levy v. Louisiana, 391 U.S. 68 (1968).*

The liberty interest at stake in this case is of crucial significance. It is a child's interest in maintaining the emotional and psychological relationship with care-taking adults who give the child his or her sense of security and identity. Surely, the concept of "liberty" includes a child's interest in maintaining such a fundamental relationship.

Though that interest is anything but absolute, it is an interest of sufficient magnitude that it is protected by the Fourteenth Amendment from arbitrary and capricious impairment by government officials. Surely this Court has never denied the protection of the due process clause to government deprivation of an interest of a similar magnitude.

* Nor does the fact that the state purports to always act in the child's best interests defeat the right to have such a crucial interference in a child's life protected by due process of law. Good motives do not guarantee fairness, an absence of bias, or even carefully considered decisions. In re Gault, *supra*.

State appellants argue that this Court's rationale in Meachum v. Fano, 427 U.S. ___, 49 L.Ed.2d 451 (1976), should be applied to defeat the due process right in the present case. In Meachum, this Court held that the due process clause does not require procedural safeguards when a prisoner is transferred from one prison facility to another. Viewed either from the standpoint of the liberty interest theory of due process, or the property-entitlement theory, see discussion infra, Meachum is totally inapplicable to the case.

In Meachum, this Court held that a prisoner's liberty interest is extinguished by a valid conviction which, under the circumstances of that case, empowered the state to confine him in any of its prisons. In urging that Meachum defeats the claim of foster children to a liberty interest in a foster family relationship, appellants necessarily suggest that children in foster care have no greater liberty interests than convicted prisoners. Such an argument is totally inapposite to the present case.

This Court need not reach the question of whether the liberty interest of the foster child in the long-term foster family relationship should be equated with the liberty interest in a biological family relationship.

The District Court below eschewed reaching such "interesting," "important," and "considerably. . .difficult" questions* as the definition of the family and whether the foster home should be accorded the same protection as the more traditional family unit based on biology.

Instead, the court based its decision on far narrower grounds, holding that the decision-making process was sufficiently important, and its impact on the life of the child affected of sufficient consequence, that as a matter of constitutional right a child could not be removed from a foster home without a prior hearing which satisfies the requirements of the due process clause of the Fourteenth Amendment.

2. The State-Created Benefit

This Court may affirm the decision of the District Court, however, without deciding whether the "liberty" that is protected by the due process clause encompasses a child's interest in the foster family relationship.

As this Court recently restated in Meachum v. Fano, supra, important state-

* A.J.S. 8a-9a.

created benefits are also entitled to the protection of the due process clause to insure that such benefits are not "arbitrarily abrogated." Meachum v. Fano, supra, 49 L.Ed.2d at 460, citing, Wolff v. McDonnell, 418 U.S. 539, 557 (1974). See also Goldberg v. Kelly, supra; Bell v. Burson, 402 U.S. 535 (1971); Perry v. Sinderman, 408 U.S. 593 (1972).

A child's relationship with his or her foster family is just such a state-created benefit. The state of New York has chosen to provide the great majority of children for whom it has assumed responsibility with the benefit of living in an individual foster home and forming a relationship with adults the state has approved as suitable foster parents. See Point I, A, supra.*

* The director of a large New York City child-care agency testified:

"We have a very positive opinion about foster family relationships. We work very hard to make those relationship[s] very close so that the child will have. . . good care and close care. . .

"Also if it's not possible for him to be returned to his natural parent or placed in an adoptive home outside of the foster home, working in a family centered way with the foster parents and bringing--helping to bring about a close relationship, benefits the child in maintaining a home for him that will be personal one." (A. 290a)

The state's frequently expressed legislative goal* is to provide permanence and stability to children in foster care. Foster parents are persons with unique abilities to form warm relationships to children.** For a child dislodged from a biological family, placement with a foster family, is "the best available substitute for the actual family structure." Ramos v. Montgomery, 313 F.Supp. 1179 (S.D. Cal. 1970) (three judge court) aff'd mem. 400 U.S. 1003 (1971)***

* Barriers, supra, p.18, brief of state appellants, p.4

** A. 290a

*** State appellants urge that Meachum also defeats any entitlement interest in the foster family relationship requiring due process protection. Massachusetts did not necessarily intend to convey a benefit upon prisoners by placing them in one prison rather than another. Here, on the other hand, the defendants do not deny that foster care placements are intended to serve the interests of the child. It is instructive to note, however, that state appellants, charged with responsibility for the well-being of children, press the Meachum analogy, thereby suggesting that one foster parent is indistinguishable from another, and that a child's relationship to a foster parent who has nurtured the child for more than a year is comparable to a prisoner's relationship to the place of his confinement.

In short, the state provides a foster child with the benefit of an approved, licensed, supervised foster family with the recognition and expectation that the relationship which will develop between foster child and foster family will be valuable to the child. Removal of a child from a foster home in which the child has lived for a year or more, and by which time the foster child and parent(s) are likely to have formed a significant relationship*, constitutes a withdrawal of an important state-provided benefit.

* Indeed, in recognition of the significance of a particular foster family relationship, the state has provided foster parents with increasing rights in their relationship with their foster child, see, e.g. New York Social Services Law §383(3), (R.A. 4a). These new-created rights do not, however, effect the issues in this lawsuit. See Point II, infra.)

POINT II

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CHALLENGED NEW YORK PRACTICES AND PROCEDURES FOR REMOVING FOSTER CHILDREN FROM FOSTER HOMES DO NOT SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

The District Court decision relied on this Court's traditional and recently reaffirmed view of the protection provided by the due process clause to hold that government action resulting in concrete loss or harm will give rise to due process safeguards under the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693, (1976);* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goss v. Lopez, supra; Goldberg v. Kelly, supra.

* In Huntley v. Community School Board of Brooklyn, 543 F.2d 179 (2d Cir.1976) the Second Circuit found that the due process clause had been violated, citing Board of Regents v. Roth, supra, and emphasized that the holding in Paul v. Davis, supra, merely distinguishes between remote harm caused by officials abusing their power and harm arising out of the exercise of official responsibilities.

Once it has been determined that the due process clause applies, the determination of how much process is due depends on the circumstances of the particular case and

"must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."
Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Goldberg v. Kelly, supra, 397 U.S. at 263.

A. The Constitutional Inadequacy of the Challenged Procedures

State appellants argue that existing procedures satisfy due process requirements, particularly since there are no antagonistic interests between the child and the decisionmakers.* Therefore, the state argues, either the due process clause does not apply or, if it does, the procedures declared unconstitutional by the district court satisfy whatever due process interest

Appellant Shapiro's brief, pp. 28-29

there might be. Antagonistic** interests have never been a prerequisite for finding that due process rights exist,** although they may play a role in determining what procedure is constitutionally mandated.

** In the present case, public money is conserved by a decision to remove a child from a foster home and return the child to his or her biological parent. Even if the biological parent receives federal Aid to Families with Dependent Children, that amount is less than the amount expended for foster care. Ramos v. Montgomery, supra. In that sense, an agency worker has an interest antagonistic to making the best possible decision for the child, in the same sense that a welfare worker may have had in Goldberg v. Kelly, supra. Appellees cite this example only to demonstrate the insubstantiality of such an argument, and not to suggest that such an "antagonism" is a relevant factor.

*** Thus in Goldberg v. Kelly, supra, the welfare worker making the decision to terminate benefits could be said to be antagonistic in the sense that he or she was concerned with improper expenditure of public money but that worker also had a competing interest, that of ensuring that needy and eligible recipients received the financial assistance to which they were entitled. Nor did the state have any particularly antagonistic interest in suspending a driver's

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In weighing the procedures in practice in New York,* the District Court relied on factors recently emphasized by this Court in Mathews v. Eldridge, supra. In Mathews, the Court

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license in Bell v. Burson, 402 U.S. 535 (1971); or in unreasonably evicting a particular family from public housing, Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied 400 U.S. 853 (1970); or in a teacher's unnecessarily suspending a student, Goss v. Lopez, 419 U.S. 565 (1975).

- * Court-appointed counsel for the children, while arguing that no due process rights should have been recognized by the District Court, concedes that the challenged New York procedures contained in 18 N.Y.C.R.R. §450.14 "do not meet all the requirements of due process." Appellant Gandy's brief, p. 14.

readily acknowledged that procedural due process applied to termination of social security disability benefits; the issue was what process was due. In reaching its determination, the Court, Mathews v. Eldridge, supra, 47 L.Ed 2d at 33, set out a three-pronged test: the private interest affected by the government act; the risk of incorrect deprivation and the degree to which better procedures would alleviate risk, and the governmental interest involved.

In Mathews v. Eldridge, supra, the neutral nature of the information to be assessed prior to termination of disability benefits, the availability of adequate review procedures subsequent to termination, and the provision for full retroactive payment satisfied due process requirements. In the present situation, the District Court considered the three elements of this test and found that each of them supported a finding that present New York procedures failed to satisfy constitutional due process requirements. The interest affected in the present case is a critical one, the child's interest in a state-created family relationship which has been in existence for a year or more. See Point I, supra.

The District Court concluded that the information to be assessed in determining whether to disrupt that relationship is often anecdotal, subjective, gathered from a variety of sources, not fully available, conflicting,

and "some of it biased." (A.J.S. 20a, fn. 13a).^{*} Nor are there any specific written criteria to guide the decision-making process.^{**}

In Mathews v. Eldridge, supra, the decision to be made was based on a very narrow inquiry, one particularly suited to written submissions, in contrast to a decision for which a prior hearing is constitutionally mandated, such as the one in the present case, in which "a

^{*} For example, if appellee Madeline Smith had had an opportunity to present all relevant information at a full and fair hearing, the agency's decision to remove the children from her foster home would have been reversed. The Family Court judge hearing her application to adopt the children, (R.A. 116a) did not suggest the children be removed from her home, nor has the agency made any such suggestion since a new worker was assigned after the commencement of this lawsuit.

^{**} A, pp. 281a, 288a.

wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process." Mathews v. Eldridge, supra, 47 L.Ed 2d at 38, citing Goldberg v. Kelly, supra, 397 U.S. at 269.

The Court in Goldberg v. Kelly, supra, recognized that due process protections are necessary because government decision-makers, no matter how benign and well-motivated, can make mistakes. Due process protections tend to minimize these mistakes by guaranteeing that as much information is presented as possible, in as fair and unbiased a procedure as feasible.

"In almost every setting when important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." id at 269.

In Goldberg v. Kelly the Court said, id at 270, citing Greene v. McElroy, 360 U.S. 474, at 496-479 (1959):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual

so that he has an opportunity to show that it is untrue."

The evidence in the record indicates the concern that several eminent psychiatrists share about how agencies decide when to remove children from foster homes and their familiarity with the mistakes made in the absence of a more reliable decision-making process.

When asked about her familiarity with the decision-making process in New York agencies, Dr. Marie Friedman testified:

"Q. Do you have any experiences with the decision-making process in these agencies? A. I do, and I don't like to say it, but the fact is that this is an area of enormous distress to those of us dealing with psychiatric problems and child development problems.

Q. Could you tell us why?
A. I really wish I knew the answer. I can only describe what goes on. There can be a dossier ten inches thick on a youngster. It can have information beyond what anyone needs to make any kind of a decision, and either it isn't read or it isn't understood, and all kinds of action goes on in terms of moving kids around inappropriately without regard to the already compiled information or to

. . . recommendations that supposedly they come to us for.

There is a kind of - I am sure it is based on some good intentions, a sense of ownership as far as children are concerned." (A, 268a-269a).^{*} See also R., dep. of Dr. Albert Solnit pp. 34-35, docket entry #137; testimony of Dr. Stella Chess, A., 127a.

* "There is substantial evidence. . . that many public social work agencies have untrained or poorly trained staff.⁷⁴ Turnover among caseworkers is very high. [fn. omitted] Record-keeping is sometimes so bad that case records do not even permit continuity of treatment among workers, let alone outside evaluation of effectiveness.

74. . .

According to an amicus brief submitted on behalf of the Social Service Employees Union, Local 371, AFL-CIO, the union for New York City social workers, 'caseworkers are either badly trained or untrained' and are likely as well to be 'young and inexperienced.' Quoted in Wyman v. James, 400 U.S. 309, 322-23 n. 11 (1971)." Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 Stanford Law Review 985, 998 (April 1975).

The agencies themselves, of course, believe their decision-making process to be adequate and without the necessity for review.*

* In recognition of the fact that thousands of children were growing up in "temporary" foster care, their relationship with their biological parents effectively severed even if not formally terminated, with no effort being made to find adoptive homes for them, the New York State legislature enacted New York Social Services Law §392 in 1971. The purpose of the law is to review the status of children in foster care; it does not affect the issues in this case, see discussion, infra. Yet in spite of the well-documented failing of agencies to put the theory of foster care into practice, see, e.g., Bellisfield, Allen and Hyde, Census of Children in Care Who May Need Adoptive Planning, (1971), prepared for the New York City Department of Social Services, the agencies vigorously

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A carefully-documented report on children in New York, prepared by the Foundation for Child Development, State of the Child, supra, expresses skepticism about the ability of child-care agencies to assess themselves, pointing to the contrast between findings concerning the appropriateness of placement prepared by Professor David Fanshel and based on assessment data supplied by the agencies themselves and the findings in a study "commissioned by the [New York] State Board of Social Welfare, employing professionally developed criteria and expert readers"* which came to very different conclusions. The report stated,

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resisted any attempts at limiting or reviewing their complete and total discretion.

"The enactment of Section 392 was accomplished over the virtually unanimous protestations of child care agencies and social services officials throughout the State. It made the Court an instrument of accountability in this State, necessitated in part by the failure of social services agencies to effectively monitor the progress of children in their care." Barriers, supra, at p. 14.

* State of the Child, supra, pp. 68-69.

"Clearly, those who work in child-caring agencies have a more optimistic perspective than do outside researchers."*

Two directors of large New York City child-care agencies testified that decision-making with regard to what was best for a particular child could reasonably be the subject of disagreement.** It is therefore of crucial importance that all relevant information, including conflicting opinions and judgments, be presented to an impartial decision-maker who can weigh the facts and determine which opinions are based on sound and reliable information.

Judge Lumbard, writing for the three-judge district court, concluded that

"the state in its parens patriae capacity, will be better able to make an informed decision after a hearing at which all relevant information has been presented.

* State of the Child, supra, p.68.

** A. 284a, 291a. There have been no studies on the number of instances in which children have been unnecessarily removed from foster homes. However, Prof. Fanshel's study shows that 10 percent of the children who left foster care and were returned to their biological parents had to be returned to foster care, with some

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Plainly, the present pre-removal conference is not designed adequately to fulfill this data gathering function." (A.J.S. 12a)

Although the post-removal conference provided by 18 N.Y.C.R.R. §450.14(e) and New York Social Services Law §400 more adequately fulfills a data-gathering function,* the District Court recognized that post-removal procedures cannot possibly make a child who suffers the trauma of an unwarranted separation whole again,** unlike the person who

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children experiencing four returns home and three reentries into foster into foster care. A. 179a.

* It does not provide any representation for the foster child and is dependent upon the request of the foster parents, both defects of constitutional significance, in the opinion of the District Court.

** There was virtually no disagreement among the expert witnesses that it would be contrary to the best interests of a child to be removed from a foster home while there was a possibility that the removal decision would be reversed by a subsequent decision. New York Social Services Law

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has been denied disability benefits. Mathews v. Eldridge, supra. Indeed such post-removal review inflicts unnecessary pain and uncertainty on all parties involved and serves no conceivable interest.

Finally, Mathews looked to the governmental interest involved in determining whether a hearing prior to termination of disability benefits was constitutionally mandated. In the present case, the governmental interests militate most vigorously in favor of as full a review as possible prior to the removal of a child for whose welfare the state is responsible. In most instances, premature, precipitous removal does not even conserve governmental funds, since the child is likely to be removed to be placed in another foster care setting. See Statement of Case, supra. Even when viewed strictly in fiscal terms*

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\$400 and 18 N.Y.C.R.R. §450.14(c), both declared unconstitutional by the court, provided for post-removal administrative review. See R., testimony of Florence Kreech, hearing tr., p.69; dep. of Dr. Stella Chess, pp.57-58; dep. of Dr. Albert Solnit, p.32.

- * The cost of due process has never been held to be an adequate reason for denying it when constitutionally required. Goldberg v. Kelly, supra, 397 U.S. at 261; cf. Reed v. Reed, 404 U.S. 71 (1971).

the costs of providing additional* hearings are difficult to weigh as against the more remote but still fiscally significant costs of providing psychiatric treatment, remedial help, welfare benefits or even incarceration for those foster children grown to adulthood and too scarred by the instability of repeated foster care placements to function as productive citizens or parents.

The state, charged as it is with responsibility for both the emotional and physical well-being of foster children, has no conceivable interest in opposing procedures better calculated to provide such significant decisions with a greater degree of reliability.

- * It is impossible to determine at this juncture just how many children would be removed from foster homes in which they have lived for a year or more if, in accordance with the district court's decision, agencies realized that all removal decisions would have to be rationally and factually justified to an impartial decision-maker. The agency's internal reversal of its decision to remove the Gandy children from their home with appellee Madeline Smith provides a good example.

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." Anti-Fascist Committee v. McGrath, supra, at 170, 171-172, . . . (Frankfurter, J., concurring).'" Goss v. Lopez, supra, 419 U.S. at 580.

B. The Constitutional Inadequacy of Other Available Proceedings

As another attempt to thoroughly obfuscate the very simple issue before this Court, appellants argue that even if due process protections apply to the foster care removal situation, and even if the challenged administrative procedures fail to satisfy constitutional due process standards, New York Social Services Law §392 provides adequate due process protection. Indeed, appellants argue, the District Court was performing an impermissible legislative function,* since its decision mandates

* Court-appointed counsel Battenwieser's brief asserts that the District Court's decision conflicts with a recently enacted New York statute, New York Social Services Law §384-a. That statute provides that the authorized agency shall return a voluntarily-placed child to the biological parent, if

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due process after a child has been in a foster home for one year while §392 affords the same protection after 18 months. This argument is belied by the clear language of §392, the New York cases applying that statute, and the record in this case.

The District Court opinion found that §392 did not adequately satisfy the due process rights of foster children. Most fundamentally, the court held, §392 is inadequate because hearings under that section do not take place automatically upon the planned removal of a child, but only at specified time intervals or when sought by the foster parent, thus making the child's constitutional right to a hearing prior to removal dependent upon invocation by a third party.*

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specified events have taken place or conditions fulfilled, unless the agency decides it should seek a court order depriving the parent of custody. The District Court's decision merely provides a procedure to insure that all such determinations by the agency are made carefully and based on all the available and relevant information.

* The court found that the revised administrative removal procedure prepared by the New York City defendants subsequent to the commencement of this litigation suffered the same constitutional defect. The New York City procedure also suffers another fatal constitutional defect; it exempts those removal decisions in which the child is being returned to a natural parent. (A.J.S. 14a).

Of equal significance is the fact that a proceeding under §392 simply does not affect whether a child remains in a particular foster home. The District Court, in rejecting appellants' reliance on §392, characterized it as "an unjustifiably expansive interpretation of §392." (A.J.S. 14a). The Family Court before which a §392 petition is brought may only order:

- "a - continuation of foster care
- b - continuation of foster-care with a direction that proceedings be taken to legally free the child for adoption;
- c - continuation of foster-care with a direction that a legally free child be placed for adoption;
- d - discharge of the child to the biological parent."

In re L., 77 Misc.2d 363, 353 N.Y.S.2d 317 (N.Y. Fam. Ct. 1974)

The limited jurisdiction of these proceedings is well-settled. The issue of whether a child* continuing in foster

* As part of the argument that §392 provides an adequate remedy for foster children, the brief filed by court-appointed counsel for the children asserts that "the child is present during the proceedings..." and "the children are represented by Law Guardians." Appellant Gandy's brief, p.6. Unfortunately, these assertions are incorrect. There is no New York statutory requirement that

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care can be removed from a particular foster home is not an issue which can be reached in a §392 proceeding. In re W., 77 Misc.2d 374, 355 N.Y.S. 2d. 245 (N.Y. Co. Fam. Ct. 1974).* Appellants have

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a child be represented by a law guardian at a §392 proceeding, unlike at a neglect, abuse, persons in need of supervision or delinquency proceeding, see New York Family Court Act §249, although such a statutory requirement has been recommended. See Barriers, supra, pp.xiv, 9. Furthermore, a study of these proceedings found that the child is almost never present. Festinger, The New York Court Review of Children in Foster Care, 59 Child Welfare 211,213 (April 1975).

* "The only one of these [four possible dispositions] which might be considered to affect in any way the status of a party before it, is that which directs return of a child to its natural mother. Even this point is arguable. However, there can be no dispute that in spite of the fact that foster parents are given the right to participate as parties herein, no authorized disposition in these proceedings can effectuate any rights in their favor. [fn.] A separate statutory scheme has been enacted for foster parents who feel aggrieved by the actions of an

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failed to cite any cases holding to the contrary. In most instances, the order of disposition which the court enters is "foster care continued,"* the situation in which the agency remains free to peremptorily remove a foster child from a particular foster home subject only to the constitutionally inadequate procedures contained in New York Social Services Law §383(2) and 400 and 18 N.Y.C.R.R. §400.14.

(fn cont'd from preceding page)

agency removing children from them in S.S.L. §400... In short the only statutory scheme which enables a foster parent to obtain positive redress from the Courts against an agency calls for proceedings outside this Court. Logically then, the foster parents' right to participate in these proceedings as parties guaranteed by §392 is futile, of no effect and constitutes an expenditure of Court time to no avail and a waste of the foster parents' energies and emotions." In re W., supra, at 248-9

The court in a footnote summarized the significance of a disposition to continue foster care:

"[foster care continued leaves] the situation in limbo subject to a 'contract' for foster care between foster parent and agency the latter being itself a subcontractor for care between itself and the Commissioner under the terms of which the child can be removed at any time;..." id. 355 N. Y.S. 2d at 248, n.2

* Barriers, supra, Appendix II, p.7.

Appellants also refer to the availability of state court habeas corpus jurisdiction as adequate to remedy the constitutional defects in New York's procedures for the disruption of the foster family relationship. It is doubtful whether habeas corpus jurisdiction could be invoked until after the child has been removed from the foster home, and it is, at best, unclear whether foster parents have any legal basis for acting as petitioners in such a proceeding. Foster children whose constitutional rights the District Court found to be in need of protection cannot in most instances be expected to take the initiative necessary to seek affirmative judicial relief.* The possibility of extraordinary judicial remedies has never been held adequate to satisfy interests entitled to due process protection.

The decision of the District Court was based on a voluminous record, including the testimony of distinguished experts in the field of child development. Appellants

* In most instances, see e.g., New York Civil Practice Law and Rules §7801, state court proceedings could not be brought until after administrative remedies - in this case, the post-removal fair hearing provided by §400 - had been exhausted.

contend that conflicting social theories are at issue in this case; the District Court took note that important social theories had been raised but ruled that such issues need not and should not be reached by the court at this time.

Judge Lumbard's opinion for the three-judge court refrained from any holdings affecting such substantive issues as the standard to be used in determining a child's custody, describing that issue as a matter of local judgment in New York. The court merely looked to the New York procedures and applied well-recognized principles of procedural due process. The court held that the procedures for removing children from foster homes in which they have lived for a year or more are so inadequate as to not provide even minimal due process safeguards, and that the serious harm which is likely to result from precipitous and unnecessary removal cannot be cured by the availability of post-removal procedures. This narrow ruling should be affirmed by this Court.

POINT III

THERE IS A JUSTICIABLE CASE OR CONTROVERSY BETWEEN THE PARTIES WITHIN THE MEANING OF ARTICLE III, §2 OF THE UNITED STATES CONSTITUTION.

A. Case or Controversy

This case presents a live controversy between the foster children, who seek a hearing before they may be separated from their foster parents, and the defendants, all of whom oppose such hearing. That the children seek the pre-removal hearing which the District Court held was owed them as a matter of due process is clear from the record. Their pleadings requested such relief, and the oldest of the children named as plaintiffs and representatives of the class testified that she desired it.

The complaint in this lawsuit seeks to have New York Social Services Law §383 (2) and 400, and 18 N.Y.C.R.R. §450.14 declared unconstitutional on behalf of plaintiff foster children as well as plaintiff foster parents, and seeks to

"Preliminarily and permanently enjoin defendants from removing foster children from foster homes in which they have lived continuously for a period of over one year without the due process safeguards of adequate and specific notice and a prior hearing which satisfy the due process requirements of the Fourteenth Amendment. . . ." (A. pp. 35a, 36a)

Plaintiff Cheryl Wallace, a 12-year-old foster child, alleged in her affidavit in support of the application to join the Wallace foster children and their foster parents, Mr. and Mrs. Lhotan, as plaintiffs in this action, that

"11. I spoke to Marcia Lowry [originally counsel for plaintiff foster parents and foster children, now counsel for appellee foster parents] and told her that my sisters and I wanted to stay together and to stay with Mr. and Mrs. Lhotan.

12. She asked me if I wanted her to represent us in court and explained to me about the lawsuit. I told her I did want her to represent us and be our lawyer.

ooo

14. I understand what having a lawyer means and I want my lawyer to do anything that will help us stay with Mr. and Mrs. Lhotan." (R., affidavit of Cheryl Wallace, annexed to Order to Show Cause, docket entry #16)

After being joined as a party plaintiff in this action, Cheryl Wallace submitted another affidavit stating that she wanted to press in court her "right

to a review and to present what [my sisters and I] thought before we could be taken from our foster parents' home." (R., entry #51). She gave testimony to the same effect at the hearing in this case. (A. 304a-305a)

The children's pleadings and their testimony thus squarely refute the appellant-intervenors' contention that there is no case or controversy because "[t]he District Court . . . granted the children relief which they had neither requested nor wanted." Appellant Rodriguez' brief, at 37.

Although the children themselves sought the pre-removal hearing, it is true that their court-appointed counsel "neither requested nor wanted" it. This case is thus rendered anomalous by the fact that the children's court-appointed attorney has continuously opposed the relief granted to them. Notwithstanding that opposition, the District Court clearly had the authority to render the judgment it did. The children's complaint which prayed for the pre-removal hearing was neither amended nor withdrawn. Nor did any

of the plaintiffs or their representatives seek to do so.*

Even if the pleadings had not expressly requested the relief granted, the court had the power to award it so long as the plaintiff children were entitled to it. Ruel 54(c), Fed.R. Civ. P. Once the case proceeds to the merits, "it is the duty of the court to grant the relief in the pleadings." 6 Moore's Federal Practice, §54.62 at 1271 (1976). It is the essence of equity jurisdiction that

"where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust

* It is doubtful that the children have standing to appeal from the judgment of the District Court. In order to appeal a party must be aggrieved by the judgment. Credits Commutation Co. v. United States, 177 U.S. 311 (1900). Successful parties have no standing to appeal. Public Service Commission v. Brashear Freight Lines, 306 U.S. 204 (1939). A party who receives all of the relief which he sought cannot appeal from the judgment which secured relief. New York Telephone Co. v. Maltbie, 291 U.S. 645 (1934)

their remedies so as to grant the necessary relief. . . [F]ederal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946)

Because the children's court-appointed counsel, dissatisfied with the judgment has chosen to appeal it,* two of the appellants erroneously conclude that there is no longer a "case or controversy" within the meaning of Article III, Section 2 of the Constitution. See appellant Rodriguez' brief, p. 37; New York City appellant's brief, p. 12.

It is clear, however, that an appointed counsel or guardian ad litem cannot unilaterally dissipate an actual controversy that exists between one party and the party for whom counsel has been assigned, merely because he or she personally disapproves of the client's claim. There is inherent "power in the courts to regulate or disregard admissions made" by guardians ad litem or counsel appointed for infants pursuant to Rule 17(c) of the Federal Rules of Civil Procedure. 3A Moore's Federal Practice §17.27. Although a guardian for

* Even though the court-appointed counsel answered the complaint, and sought to have the complaint dismissed on behalf of the foster children, (R., Answer dated November 8, 1974, filed by Helen L. Bittenwieser) the District Court did not dismiss them as party plaintiffs.

children has a "duty. . . to bring the rights of the infant [as the guardian perceives them] to the notice of the court," the guardian obviously does not have the power to impose his or her views upon the court; the court possesses the "superior power" to disregard or overrule the guardian's position. Woerner, American Law of Guardianship 64 (1897) quoted in 3A Moore's Federal Practice §17.26 n. 19; see also 3A Moore's §17.27, p.954.

Because an appointed guardian, or any counsel for that matter, may be in personal sympathy with his adversary's position that "does not relieve [the] Court of the performance of the judicial function." Young v. United States, 315 U.S. 257, 258 (1942).^{*} Although the appointed counsel in this case was in evident sympathy with the defendants, she could not and did not deprive the District Court of its clear jurisdiction to entertain the lawsuit and grant the relief it did.

^{*} Comparably, the Solicitor General's confession of error in an appeal before this Court is not dispositive without the Court's "independent consideration of the record." Chaifetz v. United States, 366 U.S. 209 (1961). See also Bruton v. United States, 391 U.S. 123 (1968), rejecting a Solicitor General's confession of error.

The role of an attorney is especially limited in class actions, where the court has a duty to assure that its judgment does justice for the entire class. For example, unlike other types of litigation, a class action may not be settled without explicit court authorization. Rule 23(e), Fed. R. Civ. P. Had the children's court-appointed counsel in this case wished to settle the children's claims by foregoing the preremoval hearing, she would have had to seek the District Court's approval which, in light of its ultimate judgment, would surely have been withheld.*

Rather than eliminating the case or controversy, as appellants contend, the appointment of special counsel for the children in this case actually assured "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). At the time of her appointment as the children's counsel, Ms. Buttenwieser's opposition to pre-removal hearings on the basis that they were not in the children's interests, and her regular representation of the very agencies whose discretion is at

^{*} As members of a class certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure all the children in the class are bound by the judgment of the District Court and cannot opt out of the class. Rule 23(c)(3); Fed. R. Civ. P.; Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961).

issue in this lawsuit, were a matter of record.* With her appointment the District Court was merely ensuring the vigorous presentation of differing views. In an opinion declining to appoint alternative or additional counsel to represent on appeal the rights of foster children as established by the three-judge court, Judge Robert L. Carter specifically stated,

"Ms. Bittenwieser has consistently represented the position she sincerely believes to voice the best interests of the foster children she was appointed to speak for. . . . Ms. Bittenwieser has made her views clear from the outset. . . . I believe her position is unsound. . . ." (R., memorandum endorsement June 29, 1976, p. 2, docket entry #107)

The District Court was confident that the foster parents would actively

* See, e.g., In re Jewish Child Care Association [Sanders], 5 N.Y.2d 222, 235, 183 N.Y.S.2d 65, 75 (Froessel, J., dissenting). Moreover, it is undisputed that Ms. Bittenwieser has never met with the plaintiff children who represent the class, even when she moved to vacate the restraining orders which the court had issued with regard to them. (R., Notice of Motion filed by Ms. Bittenwieser, Dec. 27, 1974, docket entry # 64; affirmation of Ms. Bittenwieser, p.2, dated May 27, 1976, submitted in opposition to foster parents' post-decision motion for alternative or additional counsel, docket entry #107.)

seek the pre-removal hearing because it served their own as well as the children's interests. See Point III(B), infra. As is made clear by Judge Carter's memorandum opinion, supra, the court assigned Ms. Bittenwieser in order to insure that the contrary position would be argued by someone long concerned with children's interests. Appellee foster parents fairly infer that the task of arguing in favor of the pre-removal hearing was conferred upon them both by the District Court and by this Court, in declining to assign an independent children's counsel for this appeal who would seek an affirmance of the judgment below.*

The appointment of Ms. Bittenwieser was designed only to sharpen the issue and insure that all members of the class of foster children would be adequately represented. Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969).** Ms. Bittenwieser's

* See memorandum opinion of Judge Carter, supra, appeal dismissed, ___ F.2d ___, (Docket No. 76-7333, Second Circuit Sept. 21, 1976); ___ U.S. ___ (order denying appellees' motion for appointment of separate counsel, Nov. 15, 1976)

** In Dierks, a class action was allowed, notwithstanding the fact that some members of the plaintiff class opposed the relief, because the court found that their interests could be adequately represented by the defendants. Similarly in this case, Ms. Bittenwieser's representation of the class of foster children is adequate only by virtue of the presence of the foster parents as appellees,, inasmuch as the latter will assert the claims of those children who desire the relief granted by the district court. See Point III, B., infra.

appointment is simply a reflection of the sound custom in cases of far-reaching consequences to "invite specially qualified counsel to appear and present oral argument" in order to assure a full exploration of the issues. Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955).

It is thus apparent that, despite the position of the children's counsel, the case or controversy between the children and the defendants is being "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash or adversary argument." United States v. Fruehauf, 365 U.S. 146, 157 (1961). This Court need only be satisfied that "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently,'" Holden v. Hardy, 169 U.S. 366, 397 (1898)." Craig v. Boren, ___ U.S. ___, 45 U.S.L.W. 4057, 4058 (December 20, 1976). Inasmuch as the relief sought by the foster parents - a hearing prior to removal of the child - is identical to that which the District Court has granted to the foster children, this Court is assured that the judgment of the District Court will be vigorously defended. The controversy between the children and the defendants is thus squarely posed for adjudication by this Court.

B. Third Party Standing

Alternatively, as a matter of third party standing, the foster parents may seek an affirmance of the District Court judgment on behalf of the children. Had there been no plaintiff class of foster children in the District Court, the foster

parents would have had standing to assert not only their own claim to a pre-removal hearing, but the constitutional rights of their charges as well.

Although the District Court's appointment of counsel for the children normally would have relieved the foster parents of the need to raise the children's claims, their present standing to do so is essential because of the unusual feature of this case: the children's counsel has expressly and continually refused to seek for the children the pre-removal hearing to which the District Court has held they are entitled as a matter of due process. Except through the foster parents, the children have no other voice with which to assert their rights in this Court. See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974) (hereafter referred to as Harvard Note); Cf. Gilmore v. Utah, ___ U.S. ___, 45 U.S.L.W. 4053 (Dec. 13, 1976).

1. Direct Personal Injury to Foster Parents

Before a litigant may raise the claims of third parties he must, of course, allege a substantial, direct and palpable injury to himself. Here the defendants' actions have plainly inflicted "injury in fact" upon the foster parents. Baker v. Carr, supra, 369 U.S. at 204.

The defendants' failure to provide a hearing before taking a child from foster parents who have sheltered and nurtured the child for extended periods is, the foster parents claim, a violation of their rights to family liberty and privacy

guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution. (A. 28a-34a, Second Amended Complaint, ¶¶59, 60, 61, 63, 66, 68, 69, 71, 72, 73, 77) Also at stake are their professional and pecuniary interests as foster parents licensed by the state. Insofar as the removal of a child may be due to the foster parents' shortcomings, the failure to advise them of those facts and to provide an opportunity for refutation poses the threat of immediate financial loss.*

Although the District Court declined to reach all the foster parents' claims; their standing to assert them "in no way depends upon the merits of their contention that the particular conduct is illegal [as to them]." Flast v. Cohen, 392 U.S. 83, 99

* Foster parents who care for children placed with them by authorized child-care agencies in New York receive monthly payments for the care of those children. Public child care programs, such as the Nassau County Children's Bureau, pay foster parents directly out of public funds. Voluntary child-care agencies, such as Catholic Guardian Society, receive reimbursement from the local public child welfare agency, in this case Special Services for Children, which includes the payment made to the foster parents plus an additional amount for agency overhead. See Perez v. Sugarman, supra; R., hearing transcript, pp. 87-88, docket entry #84.

(1968); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). Where jus tertii standing is otherwise appropriate, this Court has not hesitated to adjudicate third party interests even without reaching the litigant's personal injury. Pierce v. Society of Sisters, 268 U.S. 510 (1925).* Moreover, since the District Court proceeded to the merits of the third party claim, at this stage the "denial of jus tertii standing can serve no functional purpose." Craig v. Boren, ___ U.S. ___, 45 U.S.L.W. 4057, 4058 (U.S. Dec. 20, 1976).

2. Relationship Between Foster Parent and Child; Mutuality of Relief

In order to assert the children's claims, the foster parents must also demonstrate that their interests and the children's are so meshed that the defendants' actions have injured them both. Jus tertii standing requires that the litigant's interests and that of the third party must

* In holding that the Pierce statute violated the due process rights of non-litigating parents this Court did not address the claims of the school officials who were parties to the action. Even where the merits of the litigant's claim have been expressly rejected, that alone has not defeated their jus tertii standing. See Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (landlords permitted to raise rights of tenants although zoning ordinance upheld); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (importer permitted to assert rights of individuals to possess obscene material although import prohibitions were sustained)

be sufficiently intertwined that judicial relief accorded one is an effective vindication of the claims of the other. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, supra; Harvard Note, supra.*

In Pierce, for example, private school officials were permitted to raise due process rights of parents in a challenge to a statute which penalized the latter for failing to send their children to public school. The interests of the school officials (financial survival of their schools) and of the parents (the freedom to raise and educate their children) were meshed in such a way that invalidation of the statute served to redress the grievances of both. See also, Procunier v. Martinez, 416 U.S. 396, 409 (1974); Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala.) aff'd sub nom. Wallace v. U.S., 389 U.S. 215 (1967); Marable v. Alabama Mental Health Board, 297 F. Supp. 291 (M.D. Ala. 1969).

In the present case, the essence of of the foster parents' grievance is that children are precipitously taken from them

* Jus tertii cases in which the litigant, the third party, and the injury to each of them are clearly identifiable have been distinguished from classic First Amendment overbreadth cases in which there is no constitutional deprivation to the litigant and the injured third party is hypothetical only. Harvard Note, supra, see Coates v. Cincinnati, 402 U.S. 611, 616 (1971).

without an opportunity for either the foster parents or the children to express their views and present relevant information, and with no assurance that all facts are before the decision-maker. The relief the foster parents sought for themselves -- a hearing prior to removal of the child -- is precisely that which the District Court granted to the children.*

This inextricable connection between the children's rights and redress of the foster parents' grievance -- a nexus sufficient to give the latter standing to assert the rights of the former -- was clearly perceived by the District Court. In according the children a hearing, the court echoed the foster parents' concern about "the capricious movement of children" and agreed that a pre-removal hearing enabled the decision-maker "to make an informed decision after a hearing at which all relevant information has been presented." (A.J.S. 11a, 12a)

* So satisfactorily does the children's relief redress the foster parents' grievances that it is unlikely that they would have appealed had the District Court reached their own claim and ruled against them. The District Court specifically did not reach all of appellee foster parents' claims. See A.J.S. 8a-9a, 20a, fn. 12.

Although the District Court expressly confined its ruling to the children's rights, it recognized that the absence of a pre-removal hearing severely impaired the foster parents as well:

"Plainly, the present pre-removal conference is not designed adequately to fulfill [the] data-gathering function. . . . [T]he foster parents are denied any right to present evidence or witnesses, the public official with whom they confer is already acquainted with the agency's version of the background facts, and the foster child whose future is at stake does not participate. Such a scheme fails to satisfy even the most minimal requirement of procedural due process." (emphasis added) A.J.S. 12a

3. Inability of Foster Children to Assert Their Own Rights

This Court has looked most favorably upon jus tertii standing when circumstances render it impracticable if not impossible for the third party to assert his own rights. Cf. Gilmore v. Utah, supra. Here, in every sense, the foster parents are "the only effective adversary of the unworthy [state action] in its last stand." Barrows v. Jackson, 346 U.S. 249, 259 (1953).

The singular inability of the children to assert their own claims to a pre-removal hearing stems from their counsel's unalterable opposition to it. See Point

III(A), supra. That opposition deprives the children who want it of any means, except through the foster parents, of seeking the hearing which the District Court held was theirs as a matter of constitutional right.

CONCLUSION

For all the foregoing reasons, appellee foster parents respectfully request this Court to affirm the judgment of the three judge district court.

Respectfully submitted

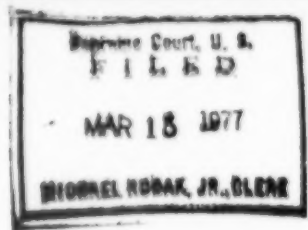
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On the brief



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

Nos. 76-180, 76-183, 76-5193, 76-5200

HENRY SMITH, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; CAROL PARRY, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS OF THE BUREAU OF CHILD WELFARE; JAMES P. O'NEIL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of NEW YORK STATE BOARD OF SOCIAL WELFARE; ABE LAVINE, individually and as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; and JOSEPH D'ELIA, individually and as Commissioner of the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

Appellants,

NAOMI RODRIGUEZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants,

DANIELLE and ERIC GANDY; RAFAEL SERRANO; and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on behalf of themselves and all others similarly situated,

Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH; RALPH and CHRISTIANE E. GOLDBERG; and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS NAOMI RODRIGUEZ; MARY
ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO

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REPLY BRIEF FOR APPELLANTS
NAOMI RODRIGUEZ, ET AL.

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POINT I
FOSTER PARENTS SEEK AN INTOLERABLE
EXPANSION OF THE STATE'S ROLE IN
CHILD REARING AT THE EXPENSE OF
FAMILIAL INTEGRITY AND PRIVACY

Children who are returning from foster care to their parents are not going to a child care institution, or to a mental hospital, or to a prison; neither are they remaining in a foster home in the uncertain "limbo" of foster care: they are returning home. Foster parents and the District Court treat these different settings as of equal importance and value: they are not. Neither is the power of the State the same when return of children to natural parents is involved.

When the State refuses to return a child, voluntarily placed in foster care, to his or her parents, the State acts not as a neutral arbiter, but as an enforcer of minimum standards of parental conduct toward children.* The rights of foster parents, which are derived from a contract with the State, cannot be greater than the power of the State to deprive parents of their children. A foster home, in this setting, is not "a private neighborhood residence. It is an institution that is licensed to operate and is fully regulated by the State." Ramos v. Montgomery 313 F. Supp. 1179 (1183), (S.D. Cal. 1970) aff'd mem. 400 U.S. 1003 (1971). The hearing mandated by the District Court is not a private dispute between parents and foster parents. It is a hearing in which the State will exercise its limited power to deprive parents of their right to the immediate care and companionship of their children.

*"Legal standards for private dispute settlement guide judicial resolution of a private controversy. In this instance authoritative resolution does not in itself expand the State's role with regard to child rearing. Legal standards for the child protection function, on the other hand, act both to define when government may intrude into the family and to control child rearing through coercion. Defining the appropriate scope of the child protection function is therefore necessarily related to profound questions of political and moral philosophy concerning the proper relationship of children to their family and the family to the State." Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law and Contemporary Problems 226 (1975) at 265.

In our democratic and heterogenous society, there is no single "best" way to raise children. Only "dangerously faulty or insufficient" parental care, In re Karr, 66 Misc. 2d 912, 323 N.Y.S. 2d 122, 127 (Family Ct., Richmond Co. 1971) has provided a sufficiently compelling basis for depriving parents of their children. This standard is embodied in State child protective laws, N.Y. Family Court Act, Article 10, defining child abuse and neglect with reference to a "minimum degree of care". F.C.A. §1012.

In Yoder v. Wisconsin, 406 U.S. 205, this court held that the mere fact that a child might be "better off" in an environment other than his parents' did not justify state interference with parental decisions. The State's interest in depriving a fit parent of the custody of his or her children has been said to be "de minimis". Stanley v. Illinois, 405 U.S. 645, 657. Thus parents have been free to control the care and custody of their children within very broad limits.

The foster parents' conception of the role of the State with respect to child rearing is very different. Their argument makes it clear that they want hearings so that they can keep foster children regardless of the willingness and ability of the children's parents to care for them (Appellees' Brief pp. 46-47).* They claim that the State can use the State operated foster care system to destroy the families it was intended to serve and to establish families out of randomly selected children and foster parents instead.

A democratic State should not have and should not

*However, like plaintiffs Goldberg and Lhotan they do not necessarily want to adopt the foster children. A. 298a-299a; State ex rel Wallace v. Lhotan, 51 A.D. 2d 252, 25, 380 N.Y.S. 2d 250, 254. At the same time, children whose parents visit and want them are not available for adoption. S.S.L. §384-b, F.C.A. 611. Thus retention of children in foster care means continued State responsibility for child rearing.

exercise such power. It is intolerable to subject a parent to a hearing concerning her right to her child when there has been no accusation of unfitness made against the parent. Surely, the hearing cannot be required solely to permit the foster parent to go on a fishing expedition to gather information as to a natural parent's failings. The State would violate a fundamental ethic of civilized society if it took a mother's child from her, at her request, to help her sustain her family, gave her no inkling that she must solve her problem and take the child home within a specified time period, waited until the mother and the state had agreed that she was ready and fit to take the child home, and then required her to contest the custody of her child with state-compensated foster parents because one year had passed and the child may have become a "member" of a new family.

The enforced separation of parents and children by the State involves one of the most extreme applications of State power. The use of such power, unless exercised for the most compelling reasons and with strict adherence to law, has been associated only with totalitarian regimes.*

There should be affectionate ties between children and foster parents; but, the State may not use the presumed existence of such ties after one year by themselves to deprive parents of their children.** Nor would it be appropriate for the State to hold hearings to measure and compare the emotional attachments between children and parents and children and foster parents, as intimated by the district Court A.J.S. 16a.

*Perpetrators of such actions were tried and convicted for crimes against humanity at the Nurnberg War Crimes Trials. U.S.A. v. Ulrich Greinfeldt, et al: Trials of War Criminals, Vol. IV., Case 8, 1949.

**James v. McLinden 341 F. Supp. 233 (D. Conn. 1969) is beside the point: There a child had been left with a neighbor by his mother; subsequently the state tried to take the child from the neighbor. The neighbor was not a state foster parent and there was no conflict between her and the child's mother.

An essential characteristic of the fundamentally protected rights of parents to the care and custody of their children must be freedom from the power of others to compete for those rights because they too love the children or even love them more. Spence Chapin Adoption Service v. Polk, 29 N.Y. 2d 196, 324 N.Y.S. 2d 937, 939 (1971).* To interfere with parental rights on that basis would utterly destroy "the private realm of family life." Griswold v. Connecticut, 381 U.S. 479,495 (1965). Measurement of the private emotions of parents and children toward one another would be the ultimate invasion of privacy. It would be dangerous for the government to have such power.

The State does not have the power to distribute children of fit parents to State-selected foster parents, any more than it has the power to proscribe marriage and procreation on racial and eugenic grounds Loving v. Virginia 388 U.S. 1 (1967) Skinner v. Oklahoma 316 U.S. 535 (1942).

The family is more than random adults and children living together; it is more than warmth, although parents and children usually have warm and intense feelings for one another.

*In Bennett v. Jeffreys 40 N.Y. 2d 543, 387 N.Y.S. 2d 821 (1976) the New York Court of Appeals allowed that in "extraordinary circumstances" involving placement for 7 years, the child's attachment to a non-parent could be a factor. This would not be the case with a one year placement. In Ruth "J" v. Beaudoin A.D. 389 N.Y.S. 2d 473 (App. Div. 3rd Dept. 1976), involving an 18 months placement, the Bennett exception was held to be inapplicable. Application of the "extraordinary circumstances" standard to one year cases would be unconstitutional whatever its validity in a 7 year case. In effect, that is the result foster parents seek in this action. The New York Court of Appeals has never regarded the custody standard between parents and non-parents as a matter of "local" judgment A.J.S.11a. It has always assumed that the standard was limited by constitutional decisions of this Court. See People ex rel Portnoy v. Strasser, 303 N.Y. 539,544 (1952); People ex rel Kropp v. Shepsky, 305 N.Y. 465,469 (1953); Spence-Chapin Adoption Service v. Polk, 29 N.Y. 2d 196,205 324 N.Y.S. 2d 937,944,045 (1971); Bennett v. Jeffreys, 40 N.Y. 2d 543, 387 N.Y.S. 2d 821,824,825,826 (1976).

The family is a central legal, social and moral institution, with roots in religion and natural law.* In our society, the legal and biological parent-child relationship is the social norm. Along with the relationship between man and wife it is the core family relationship. It is this relationship which this Court has found to be fundamental and protected from authoritarian interference by the government. To ignore "the biological relationship is to avoid the issue". Stanley v. Illinois, 405 U.S. 645, 652 (1972).** However, if the parent-child relationship is recognized as more "precious" and "essential" than "liberties which derive merely from shifting economic arrangements" Stanley v. Illinois, 405 U.S. 645, 651 (1972) and cases cited therein, then parents and children cannot be interchangeable like parts in a car.

For over two thousand years various "experts" have believed that the "good" society, however defined, could be created

*Goode, The Family (Prentice Hall, Inc. 1964), pp. 2-5, 19; Levy, The Rights of Parents, 1976. Brigham Young University Law Review, No. 4 p. 693; Caplow, The Loco Parent, 1976 Brigham Young University Law Review, No. 4 pp. 711-713.

**The foster parent-foster child relationship is not comparable to the natural parent-child relationship. It is not basic to our social structure nor hallowed by tradition. It is a finite, not a permanent relationship, circumscribed by the terms of the foster parents' contract authorizing the agencies to remove the child at any time. A 76a-78a. The foster parent may also terminate the relationship at any time: According to the City of New York approximately 38% of foster children transferred in one year were moved at the request of foster parents. A Parry 90a.

The foster parent has no obligation or "high duty" toward the child, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). For biological parents, both duties and rights are inherent in the parent-child relationship. Ramos v. Montgomery 313 F. Supp. 1179, 1183 (S.D. Cal, 1970) aff'd mem. 400 U.S. 1003 (1971). Nor is the foster home a private enclave, the way the natural home is. Routine decisions must be approved by the agencies A 76a-78a. Nor is the emotional relationship between natural parents and their children and foster parents and foster children necessarily comparable. See Fanshel A 166a-167a. Indeed, the foster parents' experts concede that "under the terms of the [foster parent] agreement, the child-foster parent relationship has little likelihood of promoting the psychological parent-wanted child relationship." Beyond the Best Interest of the Child (1973) p. 25. Finally, there was no basis whatsoever in the record for assuming the relationship acquires protected status after exactly one year of foster care.

through state control of child rearing. However, this approach is antithetical to our form of government* and has been firmly rejected by this Court. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court rejected the model for state control of child rearing presented in Plato's Republic as alien to our democratic values. According to Plato, family life was to be replaced by state selected parents, other than the children's own, so that "no parent is to know his child, nor any child his parent," Id. 401-402. Regarding this system, the Court stated:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individuals and state were wholly different from those upon which our institution rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution. Id. at 402

That no Court should impose such restrictions is equally clear.

POINT II
NEITHER THE INTEREST OF CHILDREN, FOSTER PARENTS OR THE STATE REQUIRE THAT ALL PARENTS WHO HAVE PLACED CHILDREN IN FOSTER CARE BE TREATED AS UNFIT

Appellants parents have never denied the power of the State to separate children from abusive, neglectful or abandoning parents. However, the interest of no party to this action permits a federal Court to treat legally fit parents as unfit and to strip them of all the procedural protections required by due process, and provided by State law, before parental unfitness can be established and parents and children separated.

Foster parents continue to insinuate that parents who

*[T]he makers (of the Constitution) did not specifically provide for the separation of family and state because they assumed the absence of any possible connection between the family and the federal union. Had they decided to regulate the relationship, they presumably would have stipulated that the family and the State should be kept separate on much the same grounds as in the case of religion. The government is likely to corrupt the family whenever it attempts to improve it because it has no legitimate authority to set goals for individuals." Caplow, The Loco Parent, 1976, Brigham Young University Law Review, No. 4, p. 709, 713.

place their children in foster care and struggle* to take them home are "bad" parents--neglectful strangers, unworthy of rights. This transparent effort to prejudice the Court should not succeed. There are neglectful and abusive parents with children in foster care. Appellants parents who have children in foster care as a result of voluntary foster care placement are not those parents.** Otherwise, why would N.Y.S.S.L. §384-a require such an adjudication (or another adjudication of unfitness) to support an agency refusal to discharge a child from foster care, or, provide that a voluntary placement was not a "remand or commitment" under N.Y.S.S.L. 383(1).

A mother who is ill and has to be hospitalized with no one to care for her children, a mother who is blind and mistreated by her husband, a mother alone who breaks down under stress, a mother who is stranded without home or funds, is not a "bad" person or a "bad" parent. Her acceptance of help from the State, when she feels she cannot cope, makes her a concerned responsible parent. These circumstances invite compassion, not scorn and contempt. Nor do children in foster care return home to parents who are strangers. No Court has held that appellants parents failed to visit their children, N.Y.S.S.L. 384-b; F.C.A. §611. The record shows just the opposite: children going home are typically visited children whose relationship to their parents is ongoing.***

*For a description of the experience of having children in foster care, see McAdams, *The Parent in the Shadows*, 51 Child Welfare 51 (1972).

**Foster parents know this full well. Nevertheless they use misleading quotations. Compare footnote quoting from State Report of Robert Catalano (Appellees' Brief p. 19) with testimony of Catalano explaining it, A 114a-119a. Similarly the Jenkins/Fanshel study included 20% of Court adjudicated cases, A 178a.

***Main Brief Appellants Rodriguez, pp.48,fn.54. The Wallace case is atypical. Yet even the Wallace girls, once freed from the "controlling influence of the Lhotans" *State ex rel Wallace v. Lhotan*, 51 A.D. 2d 250, 257 were able to find their way with their mother in a way that belies the notion that they were ever strangers. (See "Stone" and "Clingan" affidavits, State Appellants' Reply Brief).

Further, many children return home from foster care after a stay of one year.* Appellees cannot change these facts by underlined but unsupported assertions. (Appellees Brief, p. 34.)

Significantly, the experience of Amicus, Juvenile Rights Division of the Legal Aid Society, the single largest legal representative of children in the United States (JRDLAS, p. 3) is that "most children in foster care / ^{wish to} return to their parents, whenever possible." (J.R.D.L.A.S., p. 17).

The decision of the district Court created a massive barrier to the return of children to their parents, after one year of foster care, through hearings that have no legitimate purpose. As discussed in Point I, supra, the hearings are constitutionally impermissible if their purpose is to establish that the State's foster home is "better" than the child's natural home, or to compare the emotional quality of the natural and the foster relationship. If a State cannot make this determination in a hearing than it cannot hold the hearing to make the determination. On the other hand, the hearings are not necessary to prevent the return of children to abandoning or potentially neglectful parents (a proper state purpose) because New York's Child Protective Laws, N.Y.F.C.A. Article 10, N.Y.S.S.L. §392, Foster Care Review, Proceedings to Terminate Parental Rights, S.S.L. §384-b, F.C.A. §611, and custody proceedings, S.S.L. §383 (3), F.C.A. §651, Article 70 N.Y.C.P.L.R. can more than sufficiently serve that purpose.

These laws already impinge severely, perhaps unconstitutionally, on the rights of parents. They insulate the rights

*Professor Fanshel's five year study showed that 37% of the children in his sample of 624 were discharged after the first year of placement, with 21% leaving during the second and third year. He concluded that many children could go home after the first year. A Fanshel 182a-183a; Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia Longitudinal Study*, 55 Child Welfare 143 (1976). Subsequent reports published by Professor Fanshel for the Child Welfare Information Services, Inc. show that in New York City alone approximately 48.5% of the children returning to their parents were discharged after a stay of more than one year. See Tables annexed as Exhibits A and B.

of parents to resume caring for their children from competing claims of foster parents for only 18 months.* Since the foster care system should not encourage foster parents to prevent the return of children to their parents, the procedural mechanism available to foster parents are properly not automatic. Nevertheless, they combine with actual agency practice favoring placement, to provide powerful obstacles to the discharge of children in cases where it would be harmful to them. For while the judgments of agency workers may be in part subjective and biased, as are even judicial custody decisions,** the error is against the discharge of children. Social workers charged with the protection of children err overwhelmingly against parents through the filing of "unwarranted neglect proceedings,"***Juvenile Court Judges err similarly.****

Yet, while the hearings ordered by the District Court have no appropriate or necessary function in protecting children against unfit parents, they have the effect of stripping natural parents who are not unfit of all their procedural protections against claims of unfitness under existing New York procedures.

*Child protective proceedings are available to any one, including foster parents, at any time. N.Y.F.C.A. §1032, 1033, 1034.

**Custody decisions are "indeterminate and speculative" no matter who makes the decision. . . . While judges may be ill equipped to develop and evaluate information about the child, having some other state official decide or making various procedural adjustments (such as giving counsel to the child, providing better staff to the Court, or making the proceedings more or less formal) will not cure the root problem. The indeterminacy flows from our inability to predict accurately human behaviour and from a lack of social consensus about the values that should inform the decision. (N)either greater use of existing expertise nor better procedures will make an indeterminate question answerable for an individual case. " Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 Law and Contemporary Problems 226 (1975) at 265.

***Brief, Group of Concerned Persons, p. 19

****Mnookin, Foster Care--In Whose Best Interest? in The Rights of Children, Harvard Educational Review 158 p. 178-179.

Whether the proceedings are pursuant to N.Y. Family Court Act, Article 10, or S.S.L. §392 Foster Care Review, or pursuant to Article 70 C.P.L.R. or F.C.A. §651, or S.S.L. §384-b and F.C.A. §611, parents are entitled to particularized notice of reasons why their children should not be returned to them, are assured of a trial type hearing in a Court of record, full rights of cross-examination and confrontation of witnesses, right to counsel, right to discovery, an evidentiary standard based at least on preponderance of evidence with the State and non-parents bearing the burden of proof, and plenary appellate review. See New York Family Court Act, Articles One, Two, Six, Ten, Eleven, particularly §§165 and 262 and New York Civil Practice Law and Rules in general and Article 70 in particular. Just as the District Court in its decision ignored the substantive rights of natural parents, so it also ignored the procedural protections to which they are entitled before the State may coercively separate them from their children. Matter of Ella B., 30 N.Y. 2d 352, 334 N.Y.S. 2d 133 (1972); Matter of Carla L., 45 App. Div. 2d 375, 357 N.Y.S. 2d 987 (1st Dept. 1974); Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, 405 U.S. 645 (1972). Thus "Due Process" was stood on its head.

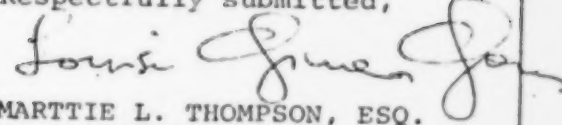
"It has been said 'Unto everyone which hath shall be given; and from him that hath not, even that he hath, shall be taken away from him.' (Luke 19:26.) To what extent does the parable reflect the situation of mothers and children? Any legal decision relating to families with children in foster care must be scrutinized to determine whether it is in fact rendering equal justice, or whether it is further punishing families who, in addition to other burdens, face the loss of each other."*

CONCLUSION

The decision of the District Court should be reversed.

*R-48 Affidavit of Shirley Jenkins annexed as Exhibit to Affidavit of Louise Gruner Gans.

Respectfully submitted,



MARTTIE L. THOMPSON, ESQ.
Community Action for Legal
Services, Inc.

Dated: New York, New York
March 15, 1977

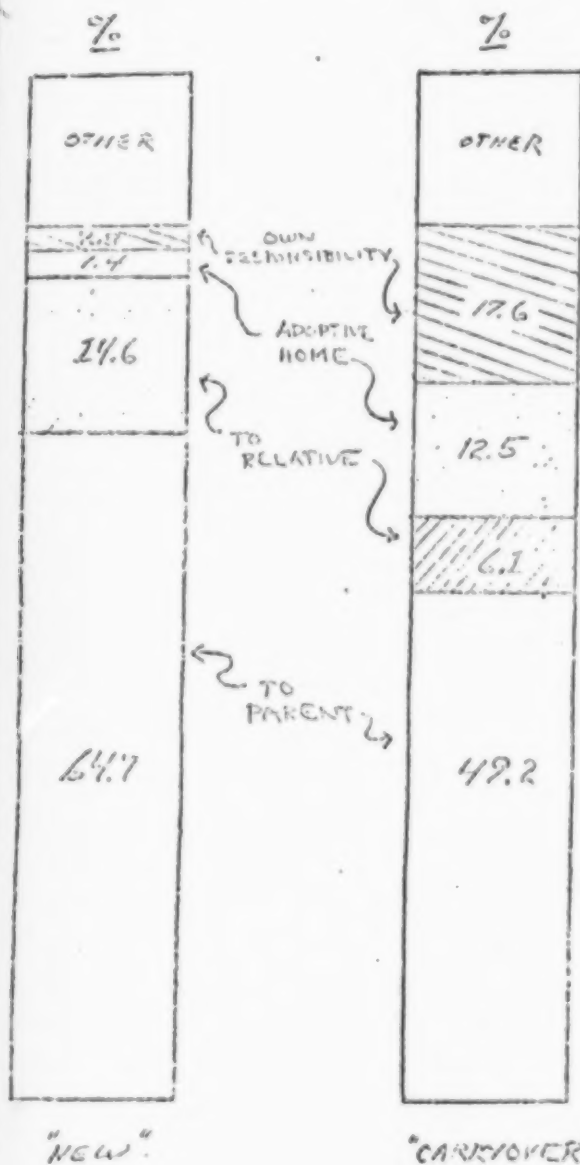
Louise Gruner Gans
of Counsel
Attorneys for Appellants
Rodriguez, Robins, Shabazz
and Collazo
335 Broadway
New York, New York 10013
(212) 966-6600

EXHIBIT "A"

There is much interest in the child care community as to how children leave care -- where do they go, and is that destination consonant with the plan for the child?

CWIS data analyzed by David Fanshel and John Grundy sheds some light on these questions.

First of all, where do the children go?



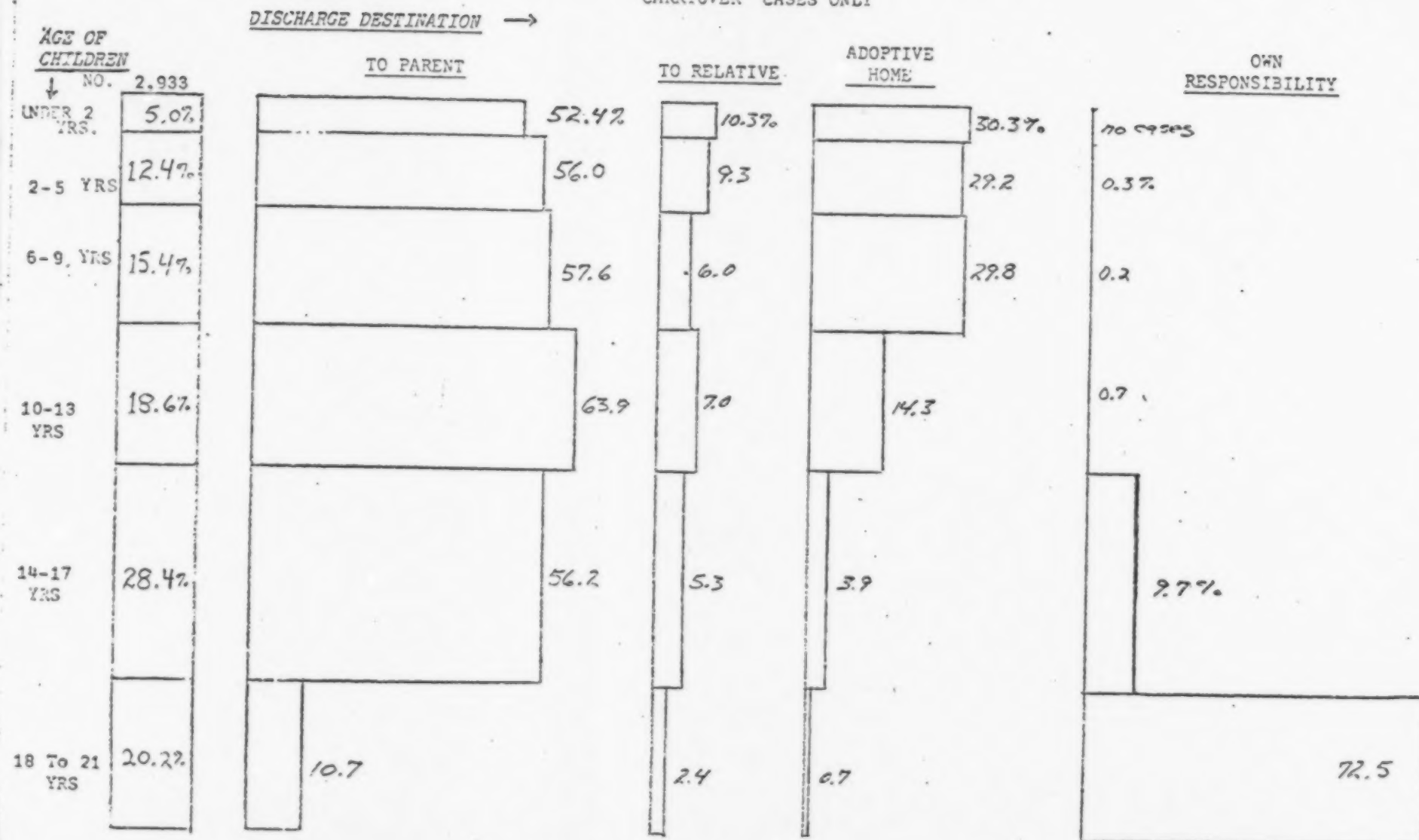
The graphs to the left indicate the discharge destinations of children discharged between June 1, 1974 and May 31, 1975.

"New" arrivals are children who entered care during the period referenced above. "Carry-over" cases are those who were already in care prior to June 1, 1974.

The display on the following page indicates (for "carry-over" cases only, during the same time period) where children went by age of child. (The chart is proportionately spaced horizontally and vertically, to indicate magnitude).

* A detailed table supporting these graphs can be found in: Fanshel & Grundy, Computerized Data For Children in Foster Care, CWIS, New York, 1975, p.43.

DESTINATION OF CHILDREN DISCHARGED - BY AGE
"CARRYOVER" CASES ONLY



CHILD WELFARE INFORMATION SERVICES, INC.
200 MADISON AVENUE, NEW YORK, N. Y. 10016

COMPUTERIZED DATA FOR CHILDREN IN FOSTER CARE:

First Analyses from a
Management Information Service
in New York City

DAVID FANSHEL and JOHN GRUNDY

COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK

APPENDIX B1

Destination of Children Discharged During Period June 1, 1974 - May 31, 1975
For New Arrivals and Carry-Over Cases*

Destination	(Percentages)	
	New Arrivals	Carry-Over Cases
Parent	64.7	49.2
Relative	14.6	6.1
Free Adoptive Home: Foster Home	0.6	1.6
Free Adoptive Home: Other	0.7	2.5
Subsidized Adoptive Home: Foster Home	0.1	7.7
Subsidized Adoptive Home: Other	0.0	0.7
Self (Own responsibility)	2.8	17.6
Adult Mental Institution	0.0	0.1
Child Mental Institution	0.1	0.5
Penal Institution	0.4	0.5
Job Training	0.0	0.3
Military	0.0	1.1
Other	14.1	9.1
Don't Know	1.8	1.4
No Response	0.0	1.5
TOTAL	100.0	100.0
No. of Cases	679	2,742

*New arrivals are cases of children who entered care during the period June 1, 1974 to May 31, 1975. Carry-over cases represent children who were already in care prior to June 1, 1974.

CWIS inc

CHILD WELFARE INFORMATION SERVICES, INC.

SYSTEM LEVEL REPORTS

DECEMBER 31, 1975

EXHIBIT "B"

PREPARED BY:
DAVID FANSHEL AND JOHN F. GRUNDY
RESEARCH AND DEMONSTRATION CENTER
COLUMBIA UNIVERSITY SCHOOL OF SOCIAL WORK
622 WEST 113TH STREET
NEW YORK, NEW YORK 10025

TABLE 53
DISCHARGE DESTINATION BY ADMISSION DATE OF CHILDREN
DISCHARGED BETWEEN 1- 1-75 AND 12-31-75
(N= 4292)

DATE OF ADMISSION:	ADMITTED	
	AFTER 12-31-74	BEFORE 1- 1-75
DISCHARGE DESTINATIONS	1	2
RETURN TO NATURAL PARENT	70.1	48.1
RELEASED TO RELATIVE	13.9	6.1
FREE ADOPT-FOSTER FAMILY	-0.0	2.5
FREE ADOPTION-OTHER	0.4	2.6
SUBS.ADOPT-FOSTER FAMILY	-0.0	11.3
SUBSIDIZED ADOPT-OTHER	-0.0	0.8
REL. TO CHN RESPONSIBILITY	2.8	18.1
ADULT MENTAL INSTITUTION	0.1	0.2
CHILD MENTAL INSTITUTION	0.5	0.2
PENAL/CORRECTIVE INST.	0.2	0.4
ENTER ADULT JOB TRAINING	-0.0	0.2
TO ENTER MILITARY	-0.0	1.0
OTHER	9.8	7.1
UNKNOWN	1.4	1.1
NOT REPORTED	0.7	0.5
TOTAL:		
PERCENT	100.0	100.0
NUMBER OF CASES	988	3304

A "-0.0" PERCENT INDICATES THERE ARE NO CASES IN THAT SUB-CATE
ROWS AND COLUMNS WITH NO CASES ARE OMITTED FROM THE TABLE.
BOO1D 1, IT EQF
REPLY Y

TO THOSE RECEIVING THE CWIS SYSTEM LEVEL REPORTS
FOR THE PERIOD ENDING DECEMBER 31, 1975

THE ATTACHED REPORT IS BASED ON DATA FROM 104 AGENCIES
OR MAJOR AGENCY DIVISIONS CURRENTLY ON THE CWIS SYSTEM. CWIS
NOW MAINTAINS RECORDS FOR 37457 CHILDREN. OF THESE 543 ARE
CHILDREN WHO ARE NOT NEW YORK CITY CHARGES AND ARE EXCLUDED
FROM SYSTEM LEVEL REPORTS. OF THE REMAINING 36914 CHILDREN
6333 HAVE BEEN DISCHARGED. DISCHARGED CHILDREN ARE INCLUDED
IN THIS REPORT ONLY IN THE SECTION CONCERNING DISCHARGES AND
ADMISSIONS. THE OTHER SECTIONS OF THIS REPORT INCLUDE 28081
CHILDREN CURRENTLY IN CARE OR ON SUSPENDED PAYMENT.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JERRY M. SAUNDERS, being duly sworn, deposes and says:
deponent is not a party to the action is over 18 years of age
and resides at 5085 Broadway, New York, New York.

That on the 15th day of March 1977, I served the within
Reply Brief of Appellants Naomi Rodriguez, et al., upon:

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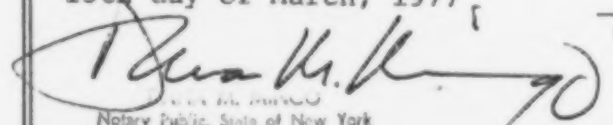
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St. Louis University School of Law
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St. Louis, Missouri 63108

Said service was made by depositing a true copy of
same enclosed in a post-paid properly addressed wrapper in a
post office under the exclusive care and custody of the
United States Postal Service within the State of New York.

Sworn to before me this
15th day of March, 1977


Notary Public, State of New York
No. 31-7964926
Qualified in New York County
Commission Expires March 30, 1978


JERRY M. SAUNDERS

MAR 15 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

76-180 HENRY SMITH, et al.,

against

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-183 BERNARD SHAPIRO, et al.,

against

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-5193 NAOMI RODRIGUEZ, et al.,

against

Appellants-Intervenors,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees,

76-5200 DANIELLE and ERIC GANDY, et al.,

against

Appellants-Plaintiffs,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR INFANT APPELLANTS

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On the Brief:

EPHRAIM LONDON, Esq.

FRANCIS L. VALENTE, Esq.

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IN THE
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Appellees,

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
 AND REFORM, et al.,
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76-5193 NAOMI RODRIGUEZ, et al.,
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against

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 AND REFORM, et al.,
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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
 AND REFORM, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR INFANT APPELLANTS

POINT I

The Court below did not, in this case, have the power to declare state laws unconstitutional or to prescribe the procedures to be followed in a state proceeding.

The brief for the Appellees ("Foster-Parents") seeks to buttress the decision of the Court below on grounds other than, and to an extent contrary to, those on which

the decision rests. The Foster-Parents argue that the disruption of a foster child's relationship with foster parents is a withdrawal of the right to a continuing benefit conferred by state law and an interference with the Constitutional right to a continuance of the relationship. (Brief for Appellees, Organization of Foster Families, etc., pp. 36-52)

The District Court did *not* decide the Foster-Parents' claim that their relationship with foster children is entitled to constitutional protection (App. J.S. 9a, 8a).^{*} And the Court rejected the Foster-Parents' claim of a statutory right to the continuance of the foster parental relationship. Under New York statutes and regulations, the relationship between foster-parent and foster-child is a temporary one, terminable at any time that a Public Welfare District or an agency acting for it deems a termination in the best interest of the foster-child. (App. J.S. 8a) The District Court stated it was "unpersuaded" by the Foster-Parents' argument that their "open-ended relationship" with their foster-children was "one of indefinite duration". (App. J.S. 8a)

The Court below held New York Social Services Law §§ 383(2) and 400 and 18 NYCRR 450.14 unconstitutional because they permitted "precipitous" decisions to remove children from foster homes without due process hearings. The consequence of an improvident separation from a foster home, the Court found, may be detrimental to the child involved. (App. J.S. 10a, 11a) The right vindicated by the District Court was the right of foster children to a due process hearing to minimize the possibility of arbitrary or misinformed action. (App. J.S. 10a)

It is clear from the District Court's findings, that it did not have jurisdiction to declare the state statutes uncon-

^{*} The abbreviation "App. J.S." refers to the Appendix to the Jurisdictional Statements. The general Appendix is referred to as "App."

stitutional or to direct the conduct of a particular kind of hearing before a child may be removed from a foster home. This action was brought pursuant to the Civil Rights Law, 42 U.S.C. 1983, to redress the alleged impairment of statutory and constitutional rights by the New York State government and its agencies. (App. 14a) To establish a cognizable claim under the Civil Rights Law, there must be a deprivation of right created by statute, or of a constitutional right other than the right to procedural due process. Jurisdiction attaches when, in the language of the statute, there has been a deprivation under color of statute "of any rights, privileges or immunities secured by the Constitution and laws". The Court below did not find that there had been a deprivation of any right or immunity other than the right to procedural due process. The right to procedural due process cannot be invoked in an action such as this, unless it is to preserve an independent constitutional right or to secure a statutory right or benefit. *Paul v. Davis*, 424 U.S. 693.

As the District Court held in the case at bar, there is no statutory right to the continuance of a foster family relationship (App. J.S.), and the Court did not find that there was a constitutional right to a continuance of the relationship (App. J.S.). The Court also found there was nothing to justify the expectation that under existing procedures, the relationship (whether or not there was a right to its continuance) might be "abruptly and summarily terminated". (App. J.S. 8a) The only right to which foster children were found entitled by the Court below is the right to a fair hearing to insure that there will not be "capricious movement" of a foster-child (App. J.S. 11a). Such hearing, the District Court held, "performs the salutary function of providing . . . an organized forum in which to gather information . . .". (App. J.S. 12a) The Court disavowed any intent to interfere with the ultimate decision with respect to removal of a child. It directed a due process hearing only to enable "the state in its *parens patriae* capacity . . . to make an informed decision after

a hearing at which all relevant information has been presented." (App. J.S. 12a)

When the sole question involved is the right to procedural due process, and it is not invoked to vindicate or sustain some other right or privilege, relief if any is available, must be obtained in the State Courts. (Some of the foster-parents resorted unsuccessfully to their State Court remedies before bringing this action in the Federal District Court.) In *Paul v. Davis*, 424 U.S. 693, the Respondent Davis had been accused wrongfully of shoplifting in a pamphlet issued by a city and county police department. Davis had not been convicted of the charge when the pamphlet was circulated, and the charge against him was thereafter dismissed. Davis brought action in the Federal District Court claiming he had been deprived of "liberty" and "property" without due process. This Court, wrote, in holding that Davis had not stated a claim for relief in the federal court:

"Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." 424 U.S. at 700-701

"This conclusion is quite consistent with our most recent holding in this area, *Goss v. Lopez*, 419 US 565 . . . , that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, 419 U.S. *id.* at 574-

575 it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right." (emphasis ours) 424 U.S. at p. 710.

This Court after discussing a number of cases, in its opinion in *Davis* (including others relied on in the brief of the Foster Parents), added:

"In each of these cases, as a result of the state action complained of a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. (emphasis ours) 424 U.S. at p. 711.

"Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." (Emphasis ours) 424 U.S. at p. 712.

In the instant case, as noted before, the District Court did not find that any "right or status previously recognized by state law"* or by the Constitution, was affected, endangered or threatened by the alleged failure of the State to afford procedural due process in proceedings to remove children from foster care. The Court found only

* *Paul v. Davis*, 424 U.S. at p. 711.

that due process procedures were necessary to enable the State, through its agencies, to reach an informed decision with respect to removal of a child from a foster home. The District Court does not have authority to declare a law unconstitutional, or to dictate the procedures to be followed by a state agency, in a case that does not involve the denial or threat of denial of any right or benefit. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 2d 60; *United States v. Raines*, 362 U.S. 17, 20-21; *Paul v. Davis*, 424 U.S. 693.

POINT II

The Foster Parents (appellees) do not have standing to advance the arguments presented on behalf of the infant appellants in their brief.

As stated before, the Foster-Parents maintained in the District Court that they had a Constitutional right or "liberty" in, and a statutory right to, a continued relationship with Foster Children in their care. The District Court declined to rule upon the one claimed right and denied the other. The Foster-Parents did not appeal from that judgment.

In their brief, the Foster-Parents again assert the existence of their alleged Constitutional and statutory rights and maintain they have the right to assert them as advocates for the Children.* The District Court rejected the claim that there is an "identity of interest between foster parent and foster child" and for that reason appointed the attorney submitting this brief as counsel for the infant plaintiffs. (App. J.S. 14a) The Foster-Parents conclude that the Court, by refusing to permit them or their counsel

* Appellees quote a twelve year old child as seeking the relief requested (Appellee's Brief at p. 76) but fail to advise the Court that she returned voluntarily to the home of her natural mother and is living there happily with her sisters. (See Affidavits appended.)

to represent the children,***** "conferred upon them" the task of presenting arguments for the children. (Appellees' Brief, p. 83) Two reasons for the general rule that a party may not assert the rights of another before this Court (*Barrows v. Jackson*, 346 U.S. 249, 255; *McGowan v. Maryland*, 366 U.S. 420, 429) are: the holders of the rights may "not wish to assert" the rights asserted and are "the best proponents of their own rights". *Singleton v. Wulff*, — U.S. —, —, 49 L.Ed. 2d 826, 833. Both reasons apply in this case.

The Foster-Parents will, of course, benefit from the Court's recognition of the alleged rights they assert for the children. As they state in their brief,* they, the foster-parents, have a pecuniary interest in keeping foster children in their care.** But they cannot assert standing to advance claims on behalf of the children unless the children's interest will also be advanced. *Craig v. Boren*, — U.S. —, —, 50 L.Ed. 2d 397, 405. Counsel for the children, whose appointment was continued after her views were made known to the courts, is convinced, as is the New York Legislature,*** the Association of Family Court Judges of New York City and a number of organizations formed to protect children**** that the period of foster-care should be shortened whenever consistent with the best interests of foster children and should be terminated without unnecessary delay when children are to be returned to a

* Brief for Appellees, p. 86.

** They also claim a professional interest as foster parents licensed by the state. Brief for Appellees, p. 86.

*** New York Social Services Law §§ 384b(1)(a), 384b(1)(b).

**** Pp. 1a, 2a Appendix to Brief for Infant Appellants.

***** The Foster-Parents attempted unsuccessfully in the District Court (on two occasions), in the Court of Appeals and in this Court, to have the writer of this brief relieved because her views with respect to the children's best interests were opposed to those of the Foster-Parents.

permanent home,—to their fit parents or to adoptive parents. (There is, of course, nothing to prevent foster parents from seeking to adopt children placed with them.)* Counsel designated to speak for the children also believes that the open contest mandated by the District Court each time a child is to be removed from a temporary foster-home, is more lacerating to the sensibilities of the child than the existing state procedures.

Respectfully submitted,

HELEN L. BUTTENWIESER, Esq.

On the brief

EPHRAIM LONDON, Esq.

FRANCIS L. VALENTE, JR., Esq.

* The following testimony of Christiane Goldberg one of the Appellees in the Court below was revealing:

Q. If Rafael were free for adoption, would you be willing to adopt him? A. He is not free yet.

Q. I said if Rafael were free for adoption. A. I don't know. He has his own identity. We wish to respect his identity, his past, his sense of belonging to where he comes from.

[136] Q. So if the agency were to undertake to free Rafael for adoption, assuming for the minute that he isn't free, would you be willing to assist the agency— A. No, I don't think he should be cut off from his original family.

APPENDIX

Affidavit of Mary Jane Brennan.

Index No. 12275-74

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

STATE OF NEW YORK ex rel. PATRICIA A. WALLACE, etc.,

Petitioner

—against—

GEORGE LHOTAN et al.,

and

JOSEPH D'ELIA, as Commissioner of the Department of
Social Services of the County of Nassau,

Respondents

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

MARY JANE BRENNAN, being duly sworn, deposes and says:

1. That I am the Director of Services to Children, Nassau County Department of Social Services.

2. That I am familiar with the present matter involving Cheryl Wallace.

3. Foster Care is a system which cares for children in approved foster homes or authorized facilities when

Affidavit of Mary Jane Brennan.

children are unable to live with their own families and has as its ultimate goal, the return of child or children to the natural parents. The Department directs its efforts toward that end, that is, the return of the child to its parents if at all possible.

4. On April 9, 1976, the four Wallace girls were returned to the Department, pursuant to the Order of the Court of Appeals of the State of New York, which had affirmed the lower court decision sustaining the natural mother's application for the return of her children. The two young girls, Kathleen and Cynthia, were returned to their mother on 4/9/76 and the two oldest girls, Cheryl and Patricia, were placed in an interim foster home in order to prepare for the return to their natural mother, within a six month period.

5. The two younger girls hereinbefore mentioned, readily assimilated themselves into their mother's home and according to observations of qualified caseworkers, were happy at home with their two younger brothers, John and William Wallace. The two older girls, Cheryl and Patricia, were placed in the certified foster home of Mr. and Mrs. DiStefano. Mrs. DiStefano, the foster mother, responded to the girls in a motherly and positive fashion. The DiStefanos understood and accepted that plans for the two girls were geared for their eventual return to their natural mother.

From the outset of their placement with the DiStefanos, the girls received and made telephone calls to various adults. These contacts culminated in the girls' running away from the foster home on June 5, 1976. During their absence from the foster home, the girls were given shelter, food and clothing. They were assisted in their efforts to conceal their whereabouts from this Department and the natural mother. Eventually, legal proceeding directed at

Affidavit of Mary Jane Brennan.

one of the aforementioned adults resulted in the girls being delivered to the Nassau County Police Department who turned them over to the Department of Social Services. Cheryl and Patricia were again returned to the DiStefano foster home.

6. Apparently the running away had a great impact on the girls. Within two weeks after their return to the DiStefano foster home, Patricia agreed for the first time to visit with her mother, sisters and brothers. She told the caseworker that she had begun to realize that her mother had been fighting for her and really wanted her contrary to the information Patricia had received from other adults. Patricia visited with her family over several weekends and on June 21, 1976, while on a week-end visit, subsequently informed the caseworker that she wished to remain permanently in her mother's home. On June 24, 1976, Patricia Wallace did return to her mother where she has happily resided to the present time.

7. Following Patricia's return home, Cheryl began to view her mother's actions in fighting for her custody in a positive light and began seriously to question the actions of her former foster parents, one of the respondents herein. As indicated in the Affidavit of caseworker Eileen Stone submitted herewith, Cheryl then made rapid progress toward being reacquainted with her family. She requested regular visitation with her family, including Thanksgiving, and on December 16, 1976, Cheryl Wallace advised her mother of her desire to return home. January 7th was selected as the date of return, thus allowing Cheryl time to say goodbye to the friends and schoolmates she had acquired while living in the DiStefano home. Thus, on January 7th, Cheryl was returned to her mother.

8. The primary goal for which Foster Care is intended has been realized in this situation. Excellent casework

Affidavit of Mary Jane Brennan.

and follow-up, as well as careful and skillful attention by the casework staff, was responsible for the reunion of the Wallace family. It is the aim of this Department to reunite children with their natural families whenever possible and to make the stay in foster care of as short a duration as is feasible depending upon the needs of the child and his family.

The reuniting of this family reflects the planning and cooperation of many parties and particularly emphasizes the sensitive and crucial role of foster parents. Whereas the former foster parents provided for the physical and material needs of the children, they thwarted efforts to reunite the children with their mother, thus prolonging the time these girls spent in the foster care system. The DiStefanos, in addition to meeting the physical and material needs of the Wallace girls, also supplied the vital ingredient, a positive attitude toward the natural mother and the family unit. In the short period of nine months, this attitude on the part of the foster parents, together with the efforts of the Department, prevented the permanent separation of Cheryl and her family and, in fact, did bring this family together. When the girls were permitted to see their mother with their own eyes and to make their own assessments without being influenced by others, the natural bond of affection which existed between parent and child was rekindled and is now flourishing.

(Sworn to by Mary Jane Brennan, January 18, 1977.)

Affidavit of Eileen Stone.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 12275-74

STATE OF NEW YORK ex rel, PATRICIA A. WALLACE, etc.,
 Petitioner,
 —against—

GEORGE LHOTAN et al.,

and

JOSEPH D'ELIA, as Commissioner of the Department of
 Social Services of the County of Nassau,

Respondents.

STATE OF NEW YORK }
 COUNTY OF NASSAU } ss.:

EILEEN STONE, being duly sworn, deposes and says:

1. That I am an employee of the Department of Social Services, County of Nassau, State of New York.

2. That I am a caseworker assigned to Unit #76, Children's Services, and that I am the Caseworker assigned to Cheryl Wallace and her foster family, Mr. and Mrs. DiStefano.

3. I initially met Cheryl Wallace on April 9, 1976, and have seen her on an average of twice monthly. Initially, Cheryl was hostile, antagonistic, moody and withdrawn. Her negative attitude was directed towards the Department of Social Services and the DiStefanos.

Affidavit of Eileen Stone.

In addition, Cheryl, who formerly had been an excellent student, was now performing poorly in her new school in West Islip. She expressed no interest in school, failed to do her homework assignments and displayed a non-caring attitude. She was apathetic towards the planning of her program for the September 1976 school year. Her attitude of defiance and unresponsiveness persisted despite all my efforts and those of the foster mother.

4. In June 1976, Cheryl's sibling, Patricia, decided to return to her mother's home and it was at this time that Cheryl's attitude began to change. Over the Summer, Cheryl's attitude towards the foster parents changed; when school began her interest increased, and she subsequently became a cooperative pleasant child and participated in family activities. In addition, contact with the West Islip School, which she attends, on October 20, 1976, indicated that she is an "excellent" student.

5. During the period of my visits with Cheryl, I have noted a very definite positive change in her attitude. On September 14, 1976, a birthday party for Cheryl was held in her West Islip home and her sisters were present. Cheryl was relaxed and happy and related pleasantly to her sisters and to me. The party was a success and her sisters felt that Cheryl was "changing".

6. On October 17, 1976, Cheryl spent the day with her mother and siblings in Long Beach while celebrating Patricia's birthday. Mrs. Wallace's sister and brother were also present. Cheryl told me that she had a great time and enjoyed meeting her relatives. In addition, Cheryl now refers to Mrs. Wallace as "mother". Cheryl further indicated at that time that she would again like to spend another day visiting with her family in Long Beach.

Affidavit of Eileen Stone.

7. In October 1976, Cheryl told me of her decision to remain in the DiStefano foster home for the next six months so that she might have time to decide about her future.

8. On 10/29/76, Cheryl again spent the day visiting her mother and her siblings, at her mother's home in Long Beach. At the conclusion of the visit, she again requested further visits and plans were made for same. She subsequently visited with her mother for weekends and for a week during the periods of November through December and the beginning of January 1977, and on January 7, 1977, she returned to live with her mother on a permanent basis, as a result of a request made by Cheryl to your affiant. Cheryl displays a great deal of affection to her mother which has been observed by your affiant.

9. Cheryl is now residing with her mother and her siblings and has requested counselling to help her through her adjustment period. Mrs. Wallace has indicated her willingness to cooperate to the fullest extent. Attached hereto is a letter from the Community Mental Health Division of the Babylon Mental Health Clinic, which indicates Cheryl's positive attitude in her relationship with her natural family.

10. For the first time in the Agency's experience with Cheryl, even prior to the termination of the prior foster parents' relationship, Cheryl now seems far happier, content and sociable than through the entire periods of her placements.

(Sworn to by Eileen Stone, January 18, 1977.)

Affidavit of Eileen Stone.

SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES
COMMUNITY MENTAL HEALTH DIVISION
LEWIS KURKE, M.D., DIRECTOR

January 10, 1977

Re: Wallace, Cheryl

Mrs. Irene Stone
Department of Social Services
900 Ellison Avenue
Westbury, New York 11790

Dear Mrs. Stone:

In accordance with your request, we are submitting the following information regarding Cheryl Wallace.

Since our last contact, Cheryl appears to have gained a great deal of insight into her relationship with her mother. She had a very good Thanksgiving with her mother and family and felt they all, "really care." She began to develop some very positive feelings about her mother and was seriously considering returning home and felt she could handle the situation.

As Cheryl's attitude toward her natural family began to modify, there were some positive changes in her personality. She was more relaxed and outgoing in treatment as she began to see her own role in relationship to her natural family.

In the event that Cheryl should return home and in spite of the gains gotten in treatment, it is our feeling that Cheryl should maintain a therapeutic relationship on an out-patient basis at a clinic near her home. I suspect family treatment would be very beneficial once Cheryl returns to her natural mother.

I trust this above information will be helpful to you in planning for Cheryl.

Sincerely,

LEONARD CHAFETZ
Leonard Chafetz, CSW
Clinic Administrator

Affidavit of Diana Clingan.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 12275-74

PATRICIA WALLACE, et al

VS

LHOTAN

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

DIANA CLINGAN, being duly sworn, deposes and says:

1. That I am an employee of the Department of Social Services, County of Nassau, State of New York.
2. That I am a caseworker assigned to Unit #73, Children Services and I am the caseworker who is familiar with and service Patricia Wallace and her five children.
3. That Cynthia Wallace and Cathleen Wallace were returned to their natural mother as per the order of the Hon. Bernard F. McCaffrey, dated November 5, 1975. The two aforementioned children have adjusted extremely well in their mother's home and are now fully integrated in the home and display affection with their mother.
4. Patricia Wallace, the thirteen year old daughter, returned to her mother's home, on her own volition, on June 24, 1976 and she too has made an excellent adjustment.

Affidavit of Diana Clingan.

She has advised your deponent that she is happy being home with her mother and her siblings. She is performing well academically, according to her Guidance Counselor at the Long Beach Junior High School.

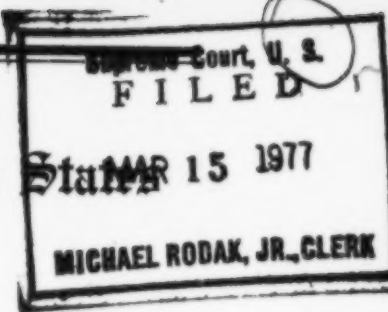
5. Homemaker services which were provided as per the Court's direction, were terminated on September 10, 1976, as Mrs. Wallace has adjusted well to the return of her children, is managing very well without the aforesaid homemaker services.

6. On October 6, 1976, your deponent paid a routine call to the Wallace home and all the children appeared to be happy and well taken care of. In addition, I have had occasion to observe Mrs. Wallace in her role of homemaker and it is your deponent's feeling that Mrs. Wallace is performing in an excellent manner as a homemaker and a mother to the five children she now has with her. In addition, I have noted displays of affection by all of the children at diverse times to their mother.

(Sworn to by Diana Clingan, October 21, 1976.)

FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976



76-180 J. HENRY SMITH, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,

Appellees.

76-183 BERNARD SHAPIRO, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,

Appellees.

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,

Appellants-Intervenors,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,

Appellees.

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,

Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
AND REFORM, *etc. et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR STATE APPELLANTS

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR STATE APPELLANTS

A. The individual foster parents and foster children

The appellee foster parents have staked their entire factual claim in this case upon their description of the relationships between the three individual sets of foster parents and children, although this action purports to in-

volve classes of foster parents and foster children. Appellees have asserted throughout their brief that these three stories are typical of the New York foster care system (see e.g. pp. 3, 15). It is therefore necessary that the present status of these cases be presented to this Court. While no valid conclusion about foster care in New York can be drawn from three instances, it is ironic that these cases highlighted by appellees support appellants.

In recent weeks, the Wallace family has finally completed the long process of reunion which began three years ago. On January 7, 1977 the last of the four Wallace children—fourteen-year-old Cheryl—voluntarily returned to live with her mother and the three sisters with whom she had previously lived in foster care. See Affidavit of Eileen Stone, sworn to January 18, 1977 at 3, submitted in *State ex rel. Wallace v. Lhotan* (Sup. Ct., Nassau County), annexed to reply brief of appellants Gandy, et al. (hereafter “Stone Affidavit”). Cheryl now displays a great deal of affection to her mother. *Ibid.* The result of Cheryl’s reunion is that she “now seems far happier, content and sociable than through the entire periods of her placements.” *Ibid.*

Cheryl’s return to the Wallace family makes it whole for the first time since 1970. Cynthia and Cathleen Wallace had returned to their mother on April 9, 1976, are now finally integrated into the home, and demonstrate their affectionate feelings for their mother. Affidavit of Diana Clingan, sworn to October 21, 1976 at 1, submitted in *State ex rel. Wallace v. Lhotan* (Sup. Ct., Nassau County), annexed to reply brief of appellants Gandy, et al. (hereafter “Clingan Affidavit”). Patricia Wallace, thirteen years old, returned to her mother’s home “on her own volition”, Clingan Affidavit at 1, on June 24, 1976, after an interim period with other foster parents subsequent to leaving the Lhotans. She is happy at home and performing well academically. *Ibid.* It was Patricia’s return home, and subsequent happy adjustment, which sparked the change in

Cheryl’s attitude that ultimately led to her final happy reunion with her family. Stone Affidavit at 2.

This conclusion to a tragic odyssey yields several lessons: 1) the combination of administrative and judicial proceedings authorized by New York law succeeded in this case in achieving the basic goal of the foster care system: reunion of a family split by forces beyond its control; 2) the removal of the Wallace children from the Lhotan home was not a grievous loss, but a necessary prerequisite to a happier future for each of them; 3) their expressed desire in 1974 and 1975 to remain with the Lhotans was not a true expression of their reasoned preference, but was influenced by forces they could not understand, including Mrs. Lhotan’s “controlling influence”, *State ex rel. Wallace v. Lhotan*, 51 A D 2d 252, 257 (Second Dept.) *motion for lv. to app. den.*, 39 N Y 2d 705 (1976), and 4) the familial bonds between Mrs. Wallace and her four children survived the children’s four to six year foster care placements, and were quickly renewed and strengthened after the final reunion of the family.

If, as appellee foster parents have claimed, the Wallace story is typical of foster care in New York, the “liberty interest” appellees urge upon this Court has no constitutional dimension.

The recent changes in the life of appellant Rafael Serano are, unfortunately, not so happy. Rafael is now living at the St. Peter’s School in Peekskill, New York, rather than with the appellee foster parents, the Goldbergs, with whom he lived at the time this action commenced and was tried. The reason for this change is that in June of 1976 the Goldbergs separated and Mrs. Goldberg moved out of the Goldberg home, taking her own child and leaving Rafael behind.* Rafael’s removal from the home to the resi-

* See petition filed in the Family Court of the State of New York, Bronx County, Case No. 2487, verified by Sidney Bruskin, Esq. and attached as an Appendix to the reply brief of appellant Smith.

dential treatment center was with the concurrence of Mr. Goldberg, who continues to see him.*

Mrs. Goldberg's expressed "commitment" to Rafael as stated in her testimony at trial was as follows:

"Q. Do you plan to adopt Rafael?

A. We have a commitment to him and to the agency that we want to keep him and raise him. We made that very clear to each one of the workers. We had to make that clear to Rafael from the beginning because it was a crying need of Rafael. He was constantly asking, are you going to throw me out, are you going to call the worker, and we had to reassure him constantly that no, we were not going to take him out, throw him out, that we were going to keep him."**

The lessons of this painful sequence of events are clear: 1) the responsibilities of foster parents toward foster children in their care are at all times terminable at the will of the foster parent without any due process whatever, no matter how the foster child may feel or what the foster child's "rights" may be; 2) the foster parent's attachment to the foster child did not match her feeling for her own child.***

* *Ibid.*

** Appendix in this Court (hereafter "A") at 298a.

*** There has been no change in the status of the Gandy children; who continue to reside with appellee Mrs. Smith. See Appendix to Brief of Appellants Rodriguez, et al., at 116a-118a. As noted in State appellants' reply brief dated Sept. 16, 1976, Mrs. Smith is disabled physically by arthritis. She altered a doctor's report dated February 13, 1974 to the Catholic Guardian Society about her condition, obliterating the last sentence which read, "The patient in my opinion is totally disabled." She is unable to accompany the children to school and six-year-old Danielle must walk five blocks, crossing main thoroughfares not attended by school crossing guards to reach the school building. Because of

(footnote continued on following page)

B. The evidentiary limitations of appellees' case in the District Court

The significance to this Court of the recent developments in the Wallace and Serrano cases is greater than it might ordinarily be because of the appellees' exclusive reliance on the three individual sets of foster parents and children to establish the constitutional deficiencies in the New York foster care system. These were the *only* specific cases as to which appellees presented proof in the District Court.* There was in addition one empirical study of children in foster care in New York—that of Dr. David Fanshel. It supported the efficacy of the current system and the District Court never acknowledged its weight or import.

The evidentiary deficiencies of appellee foster parents' case in the District Court must be stressed here, because both the foster parents and several of the *amici curiae* have sought to buttress that case in this Court through the citation of various articles and purported studies of foster care. Studies or opinions of persons who were not subject to cross-examination and rebuttal by appellants in the District Court are not evidence.

Indeed, the danger of relying on citations to academic studies is illustrated by the references in the Legal Aid Society's *amicus* brief to a study by the New York State Board of Social Welfare, "Foster Care Needs and Alternatives" (1974) (known as the "Bernstein Report"). The brief (p. 32) cites that report for the proposition that "the majority of children now in foster care are inappropriately placed." Examination of the report itself shows

(footnote continued from preceding page)

Mrs. Smith's physical condition, Eric who is nine years old must go several blocks to the store alone and pick up the family's shopping. Affidavit of Bracha Graber dated May 28, 1974 and filed in the District Court.

* It should be noted that the District Court refused to permit the appellant natural parents to present actual case histories to the court. See Brief of Appellants Rodriguez, et al. at 92-94, A. at 309a.

that the document actually states just the opposite. At page 20 it explicitly notes that 55.7%—a majority—of all current placements were appropriate. Further, in calculating the number of placements thought to be “inappropriate”, the report finds all 3,951 long-term placements in general institutions, all 214 temporary placements in general institutions, and all 190 placements in secure detention facilities “inappropriate” simply as a matter of policy, and not because the institutions were individually deficient (p. 20). These policy judgments would thus account for 15.1%—more than one-third—of the 42.8% so-called “inappropriate” placements. Thus, aside from policy disputes the Bernstein report finds two-thirds of all placements appropriate. Moreover it must be stressed that the report did not evaluate individual foster family homes or institutions to discern “bad” ones from “good” ones—it was only concerned with *types* of placements without regard to their availability in the present system.*

The brief also cites (p. 32) the report to show that the annual cost per child in a general institution is \$34,000. Again, this is a misreading of the report, which actually shows (at p. 44) that the annual cost of long-term care at a general institution is \$16,900, less than one-half the \$34,000 rate claimed in the brief. The higher rate applies only (as footnote 2 to the table explicitly notes) to temporary general institutions, such as public shelters used to provide emergency care until an initial long-term placement can be found. The difference in annual cost is substantial.

These examples are not exhaustive. They merely show the great risk in forming judgments on the basis of hearsay such as published reports.

* The report also shows that even under the authors' criteria, transfers within foster care *improved* the appropriateness of placements—raising the level of appropriate placements from an initial rate of 42.3% to the current rate of 55.7% (Bernstein report at 20).

C. The “liberty” interest alleged to inhere in the foster care relationship

The parties to this proceeding have disagreed at both stages of constitutional due process analysis: whether the foster parent-foster child relationship is a protected “liberty” interest, and if so whether New York procedures are adequate to protect it. However, some of the *amicus* groups—the Legal Aid Society (LAS), Community Service Society (CSS) and National Juvenile Law Center (NJLC) have suggested an intermediate position: that New York procedures are adequate in the event of a return to the natural parents but inadequate to protect the child in the event of a transfer from one foster home to another foster home.* See LAS at 23, 30; CSS at 7, 22; NJLC at 19, 22, 23. Another *amicus*, the *ad hoc* Group of Concerned Persons for Children (GCPC), adopted the appellee foster parents' view that a hearing is necessary in every case. GCPC at 13 et seq.

Each of the “intermediate” *amicus* groups offered a different rationale for the distinction it sought to draw. The National Juvenile Law Center saw the distinction as resulting from four countervailing administrative factors present in the return-home situation but absent in the foster home to foster home move. NJLC at 20-21, 23-25. The Community Service Society viewed the difference as stemming from the fact that in the absence of abuse or neglect, social services officials have no discretion to refuse to return a child to his natural parents. (CSS at 23). Legal Aid Society saw the distinction as mandated by a

* These *amici* disagree among themselves as to the scope of any protected liberty interest of the child in the foster care relationship. The Puerto Rican Family Institute, Inc. and Puerto Rican Association for Community Affairs, by contrast, took no position on foster home to foster home transfers in their *amicus* brief, and opposed creation of a due process right to a hearing prior to return home.

balancing of competing liberty interests of the child. LAS at 25.

These arguments are not adequate to support a distinction of constitutional magnitude. For example, the National Juvenile Law Center presents (at 20-21) some apt reasons why the return-home decision is made with care, in addition to the basic fact that child care professionals do not act arbitrarily or without good cause as a matter of course. Yet of the four factors which they believe guarantee careful return-home decisions, three are also present in the transfer decision. First, if indeed social workers share middle class values with foster parents, a worker would not be inclined to transfer a disadvantaged child out of such a stable middle-class home for any reason.* Second, large caseloads and high turnover of agency staff would militate against any ill-considered movement whatever, both transfers and returns home. (In fact one would expect return-home cases to receive priority over transfers within foster care.) Finally, foster parents would use their influence to prevent what was in their opinion an unwise transfer as well as an unwise return home, and of course could obtain a pre-removal conference in both cases. See 18 N.Y.C.R.R. § 450.10. Of the National Juvenile Law Center's four factors, only the financial disincentive factor is lacking in the transfer case, and no one has seriously claimed that agency decisions are based in any substantial way on financial considerations.

While the "intermediate" *amici* all accord distinct priority to the natural family, some nonetheless argue for the existence of a constitutionally protected liberty interest in the foster parent-foster child relationship. The appellee foster parents (brief at 45-47), argue that such an interest flows automatically from citation of various prior decisions

* That social workers do suffer from such class-colored judgments was neither alleged nor proved in this case.

by this Court concerning the family relationship in vastly different contexts.*

It is the *amicus* brief of Concerned Persons for Children, some of whom were appellees' leading witnesses, which fully delineates the implications of the "liberty" interest in the foster care relationship. The brief assumes that the foster parents are the only possible providers of "life-support systems" (GCPC at v, 26) for children once the children have been in their homes for one year. *Amicus* presents a narrow view restricted to the child's present environment, rejects psychiatric evidence of a tenacious attachment to natural parents, and assumes that these parents can offer no "life support" to their own children.

Their Orwellian argument, punctuated by a continuing cannibalistic metaphor in which the State is said to "dismember" the family and "wrench" nurturing bonds, carries an implication that no one except the child is equipped to make decisions for him while he is in foster care.** This contention would then bring due process into play in a wide range of situations. The child could arguably

* The attempt to conjure sweeping new constitutional rights for children from universally accepted generalizations about the importance of the family has met with failure on at least two recent occasions. See *Black v. Beame*, — F. 2d — (2d Cir. February 24, 1977) (Slip Op. 1991); *Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976).

Similarly, appellees' argument for the protection of the foster parent-foster child relationship as a "state-created benefit" (appellees' brief at 49-52) is erroneous under New York law, and is analogous to the arguments specifically rejected in *Black v. Beame*, *supra*, and *Child v. Beame*, *supra*. Separation from home—which is *substitute* parent care—cannot be called a benefit in comparison to available care by the real parent.

** The argument also suggests that the child should be entitled to a hearing *before* being voluntarily placed into foster care, since the State could there be said to be assisting in the "dismemberment" of the natural family. An analogous argument, raised by appellees' counsel here, was rejected in *Black v. Beame*, *supra*.

challenge school placements and medical treatment. He might also be able to challenge his foster parents' expenditure of their monthly stipend for him.*

Further, if the child does enjoy such a protected status, this status will inevitably come into conflict with his natural parent's protected interest in obtaining his return home (though it seems clear that the Group of Concerned Persons does not recognize such a protected interest, since it conflicts with their "psychological family" doctrine). The District Court's hearing requirement would be empty unless the court had intended the information presented at the hearing to be applied against a substantive standard which places a high value on the child's liberty interest in the foster care relationship. Judges would inevitably grant stays during the process of administrative and judicial review, and would ultimately give the natural parents' claim less weight than it presently has even where such parents are neither neglectful nor abusive.

Thus, both the intermediate position advocated by some of the *amicus* groups and the absolutist position urged by appellees and the Group of Concerned Persons for Children must fail because both are predicated on the existence of a liberty interest for the foster child in his relationship to a set of foster parents with whom he has resided for one year. No such liberty interest can co-exist with society's long held belief in the primacy of the natural family.

* If these predictions seem unlikely in light of today's law, it is respectfully suggested, for instance, that this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970) is today being applied in circumstances which would have seemed inconceivable when that case was decided seven years ago. See, e.g., *Schneider v. Whaley*, 417 F. Supp. 750 (S.D.N.Y.) modified and remanded, 541 F. 2d 916 (2d Cir.) *affd. on rehearing* — F. 2d —, (2d Circuit, December 22, 1976) (Slip Op. 6121), which held that there is a constitutional right to a hearing when children are moved from one day care center to another because of budgetary restrictions.

D. Existing State procedures

Both the District Court* and the appellee foster parents (appellees' brief at 70) contend that the Family Court in a § 392 proceeding lacks the power to order a foster child to remain in a particular foster home. They ignore several cases exercising that power, see *Matter of Cynthia, S.*, 74 Misc 2d 935 (Fam. Ct., N.Y. Co., 1973); *Guardianship of Denlow*, 87 Misc 2d 410, 384 N.Y.S. 2d 621 (Fam. Ct., Kings Co., 1976); *Matter of Mark H.*, 80 Misc 2d 593 (Fam. Ct., St. Lawrence Co., 1974) and rely exclusively on one 1974 Family Court case, *In re W.*, 77 Misc 2d 374 (Fam. Ct., N.Y. Co., 1974). But in that case, the court actually did direct the foster child to remain with the foster parents until after exhaustion of administrative remedies, including the § 400 fair hearing. *Id.* at 377. In so doing, the court in effect converted the § 400 hearing into exactly the kind of *pre-removal* hearing the appellees are seeking in this case.

What *In re W* actually shows is the flexibility of the § 392 procedure in protecting the rights of all the interested parties, and the rigidity of District Court's automatic hearing procedure. The ability of foster parents (and children through the Law Guardians which may be provided to them) to use the § 392 proceeding to obtain a § 400 hearing *prior* to removal eliminates the District Court's and appellees' fears of harm to a foster child through precipitous removal, and undermines the rationale for the District Court's decision.**

* Joint Appendix to Appellants' Jurisdictional Statement (hereinafter A.J.S.) at 14a, Section 392, N.Y. Social Services Law.

** The appellee foster parents also expressed doubt that they could bring a habeas corpus petition to obtain return of a foster child removed from their home. They are wrong. That form of judicial review is available to them under New York law, along with the other procedures previously detailed. See *Mundie v. Nassau County Dept. of Social Services*, — Misc. 2d —, 387 N.Y.S. 2d 767, 770-71 (Sup. Ct., Nassau Co., 1976), involving an emergency removal from a foster home on the grounds of possible abuse by the foster parents.

CONCLUSION

The decision below should be reversed and the complaint dismissed.

Dated: New York, New York
March 14, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Attorney for Appellants
Shapiro and Lavine*

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
MARK C. RUTZICK
Assistant Attorneys General
of Counsel

Louis J Lefkowitz
Attorney General
by
Maria L Marcus
Assistant Attorney General

FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

Supreme Court, U. S.
FILED

MAR 13 1977

MICHAEL RODAK, JR., CLERK

Docket Nos. 76-180, 76-183, 76-5123
and 76-5200

J. HENRY SMITH, individually and as administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Appellants,

(Additional parties listed on next page)

On Appeal from the United States
District Court for the Southern
District of New York

REPLY BRIEF OF NEW YORK CITY APPELLANTS

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LEONARD KOERNER,
ELLIOT P. HOFFMAN,
of Counsel.

-against-

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, etc., et al.,
Appelles.

BERNARD SHAPIRO, individually and as
Executive Director of the New York
State Board of Social Welfare, et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, etc., et al.,
Appellees.

NAOMI RODRIGUEZ, etc., et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM, etc., et al.,
Appellees.

DANIELLE and ERIC GANDY, etc., et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM, etc., et al.,
Appellees.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

Docket Nos. 76-180, 76-183, 76-5193
and 76-5200

J. HENRY SMITH, individually and as
Administrator of the NEW YORK
CITY HUMAN RESOURCES ADMINISTRATION,
et al.,

Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, etc., et al.,

Appellees.

BERNARD SHAPIRO, individually and
as Executive Director of the New
York State Board of Social Welfare,
et al.,

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-against-

ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM, etc.,
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NAOMI RODRIGUEZ, etc. et al.,

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-against-

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FOR EQUALITY AND REFORM, etc.,
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DANIELLE and ERIC GANDY, etc.
et al.,

Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM, etc.
et al.,

Appellees.

On Appeal from the United States
District Court for the Southern
District of New York

REPLY BRIEF OF THE NEW YORK CITY APPELLANTS

We incorporate by reference the material
submitted in the reply briefs of the other
appellants. Our reply brief will consist of

of a short comment on a copy of a petition dated February 28, 1977, in a foster care review proceeding which has been filed in the Family Court of the State of New York, pursuant to Section 392 of the New York State Family Court Act, on behalf of Rafael Serrano, a foster child who resided with Mr. and Mrs. Goldberg, named plaintiffs in these actions. This petition is attached to the reply brief as Exhibit A.

The appellees' brief discusses each of the named plaintiffs and their family relationships with their foster children. The discussion of the Goldbergs and the foster child Rafael Serrano appears at p. 14 of the brief. After a discussion of the three families, the appellees' brief states that these families "are representative of foster families whose family relationships are subject to preemptory

termination under the applicable statutes."

The facts alleged in the petition demonstrate that the foster care relationship between the Goldbergs and Rafael is representative at all, does not support the appellees' position. The petition alleges that the child should continue in foster care because

"Rafael is hyperactive with acting out tendencies and poor impulse control. Foster parents are separated. Foster mother took her own child and left Rafael behind. Child was removed from his foster home for placement at a residential treatment center with the concurrence of the foster father.*** "

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE
REVERSED AND A DECLARATION OF CONSTI-
TUTIONALITY DIRECTED IN FAVOR OF THE
CHALLENGED STATUTES AND REGULATION.

March 9, 1977.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for New York
City Appellants.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
ELLIOT P. HOFFMAN,
of Counsel.

FAMILY COURT OF THE STATE OF NEW YORK - COUNTY OF BRONX

In the Matter of the Review of the Foster Care Status of

RAFAEL SERRANO

Pursuant to Section 392 of the Social Services Law

PETITION
DSS
(Authorized Agency)

Docket No. _____

"2nd Review"

The petitioner herein respectfully alleges upon information and belief that:

1. Petitioner is an authorized agency with offices at 250 Church Street, Borough of Manhattan, City and State of New York.

2. The above-named child is a ~~female~~ male child born on or about 1/3/63. The names of the natural parents of said child and their residence addresses are as follows:
Rafael Serrano - Iris Serrano
1060 Sherman Avenue 933 E. 167th Street
Bronx, New York Bronx, New York

3. Petitioner is charged with the care, custody and guardianship of said child, in that Mother signed the voluntary authorization for placement on 8/31/67, a copy of which is annexed hereto.

4. Said child was placed in the foster care of the person(s)/institution named at the residence address set forth below and has remained in such foster care for a continuous period of at least twenty-four months:

Name of Foster Parent Institution	Address	Period of Foster Care
Mr. Ralph Goldberg	788 Carroll St. Brooklyn, N.Y.	7/11/60-6/10/76
LT. JOSEPH P. KENNEDY, JR.	1770 Stillwell Ave. Bronx, N.Y. 10469	6/10/76-6/24/76
ST. PETER'S SCHOOL	Jacobs Hill, Peekskill, N.Y. 10566	6/24/76-present

5. There are no persons interested in this proceeding other than those hereinbefore specified, except

BROOKLYN BOARDING HOME SERVICES
2 Lafayette Street 11th Floor
New York, N.Y. 10007

6. That it would be in the best interest of the child to continue in foster care because Rafael is hyperactive with acting-out tendencies and poor impulse control. Foster parents are separated. Foster mother took her own child and left Rafael behind. Child was removed from his foster home for placement at a residential treatment center with the concurrence of the foster father. Foster father is continuing visitation. There is no other feasible plan for Rafael at this time but to continue foster care in his present setting where he needs the services and the structured setting provided by the agency.

WHEREFORE, petitioner prays for a review of the foster care status of the child, pursuant to Section 392 of the Social Services Law, and that the Court enter an order of disposition continuing the present foster care of the above-named child and granting such other and further relief as to the Court may seem just and proper.

Agency #801
Term #501-2
BCW #2627371
Docket # K-4424/74

J. HENRY SMITH
HRA Administrator/Commissioner
of the City of New York
BY SIDNEY BRUSKIN
Attorney
SIDNEY BRUSKIN

EXHIBIT A

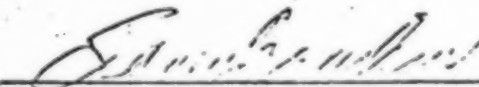
VERIFICATION

SIDNEY BRUSKIN, affirms, under the penalties of perjury:

That (X)he is an attorney duly admitted to practice in the Courts of the State of New York and is employed by the Department of Social Services of the City of New York in the office of the attorney of record for the petitioner herein, and is acquainted with the facts and circumstances of the within action.

That your affirmit has read the foregoing petition and knows the contents thereof; that the same is true to (his) ~~own~~ known knowledge except as to those matters therein stated to be alleged on information and belief and as to those matters affirmit believes them to be true; said knowledge and belief are based upon the official records and documents of the Department of Social Services of the City of New York kept in the regular course of business, and conversations with caseworkers.

Affirmit further states that the reason this verification is made by your affirmit and not by the petitioner is that the petitioner is a public officer, being the duly designated Commissioner of Social Services of the City of New York. CPLR § 3020(d)(2).


SIDNEY BRUSKIN

DATED: NEW YORK, New York
February 28, 1977

BEST COPY AVAILABLE

FAMILY COURT OF THE STATE OF NEW YORK - COUNTY OF BRONX

In the Matter of the Review of the Foster Care Status of
RAFAEL SERRANO

Pursuant to Section 392 of the Social Services Law

ORDER DIRECTING SERVICE

OF NOTICE

Docket No. _____

A petition for review of the foster care status of the above-named child pursuant to Section 392 of the Social Services Law having been submitted to this Court and it appearing that notice should be given to the persons hereinafter named, it is

ORDERED, that notice of the presentation of the petition and of the hearing to be held thereon be

given to Rafael Serrano
1060 Sherman Avenue
Bronx, N.Y.

Iris Serrano
933 E. 167th Street
Bronx, N.Y.

ST. PETER'S SCHOOL
Jacobs Hill
Peekskill, N.Y. 10566

Mr. Ralph Goldberg
788 Carroll Street
Brooklyn, N.Y. 11215

Brooklyn Boarding Home Services
2 Lafayette Street
New York, N.Y. 10007
by mail

by service of written notice/upon them within the State of New York at least 10 days before the date set for such hearing.

Signed at _____, New York, this _____ day of _____, 19 _____.

Family Court Judge

NEW YORK

County

THE CITY OF NEW YORK
DEPARTMENT OF WELFARE
BUREAU OF CHILD WELFARE

AUTHORIZATION FOR PLACEMENT OF CHILD(REN) IN FOSTER CARE

Case No. Sanctuary

This is to certify that I, Iris Serrano
residing at 572 E. 135th, Manhattan
am the MOTHER of _____
relationship _____

Name Rafael Jr. Age 4 1/2

and that I authorize the Commissioner of Welfare of The City of New York or his duly authorized representatives to place the said child or children in any duly authorized agency as defined in the Social Welfare Law of the State of New York.

I specifically agree and consent that if the child or children hereinbefore named or any of them, while receiving care in any authorized agency or society for prevention of cruelty to children, is found to be in need of surgical or medical treatment, that such surgical and medical treatment may be administered under the direction of the authorities of the said authorized agency or society for the prevention of cruelty to children without further action on my part, and that such tests or examination as they deem necessary may be given to the said child or children for the purpose of determining the need of the said child or children for medical or surgical care. I further authorize the authorities of any authorized agency or society for the prevention of cruelty to children to give such child or children any treatment, inoculation or vaccination for immunization against contagious diseases as in their judgment may be necessary for the protection of such child's or children's health.

If I do not visit the child or children hereinbefore named while in an authorized agency, as defined in the Social Welfare Law of the State of New York, for a period of twelve successive months or more and do not furnish a reason satisfactory to the Commissioner of Welfare of The City of New York or his duly authorized representatives for my failure to do so, the Commissioner of Welfare of The City of New York, in accordance with the authority vested in him by the Social Welfare Law of the State of New York, the Administrative Code of The City of New York, and the Domestic Relations Law of the State of New York, has the right to and may, if in his judgment it shall be for the best interest of the child or children hereinbefore named so to do, place out through a duly authorized agency the child or children named above in a free family home, with a view to subsequent adoption.

In witness whereof, I hereunto set my hand this 31 day of August, 19 67.

Signed in the presence of

[Signature]

Department of Welfare Representative

x Iris Serrano
Signature of Parent or Guardian

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MOTION FILED

NOV 26 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, *etc.*, *et al.*,

—against—

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-183

BERNARD SHAPIRO, *etc.*, *et al.*,

—against—

Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-5193

NAOMI RODRIGUEZ, *etc.*, *et al.*,

—against—

Appellants-Intervenors,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-5200

DANIELLE and ERIC GANDY, *etc.*, *et al.*,

—against—

Appellants-Plaintiffs,

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF THE PUERTO RICAN FAMILY INSTITUTE, INC. AND
THE PUERTO RICAN ASSOCIATION FOR COMMUNITY
AFFAIRS FOR LEAVE TO FILE BRIEF AMICI
CURIAE AND BRIEF AMICI CURIAE**

OSCAR GARCIA-RIVERA
HERBERT TEITELBAUM
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MOTION OF THE PUERTO RICAN FAMILY INSTITUTE, INC. AND THE PUERTO RICAN ASSOCIATION FOR THE COMMUNITY AFFAIRS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Puerto Rican Family Institute, Inc., (the "Institute") and the Puerto Rican Association for Community Affairs, Inc., ("PRACA"), respectfully move this Court pursuant to Rule 42(3) for leave to file the attached brief amici curiae.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief. All parties to this appeal have granted their consent except for the appellees who do not oppose the filing of this brief amici curiae.¹

¹ The letters of consent have been filed with the Clerk of this Court.

The Institute and PRACA are non-profit corporations based in New York City and serve the New York Puerto Rican community. The Institute was founded and incorporated in 1962; PRACA was founded in 1953 and incorporated in 1960.

The Institute actively provides social work, educational, psychiatric, and psychological services to maintain and strengthen troubled Puerto Rican families as part of a Comprehensive Child Placement Program. It vigorously strives to support these families and thereby prevents the need for foster care placement and promotes the return to natural parents of Puerto Rican children in foster care.

PRACA is a community based service organization providing omnibus juvenile, youth and family services to support and fortify distressed Puerto Rican families. As part of their overall

efforts, PRACA is now establishing an authorized child care agency primarily designed to promote conditions favorable to the return of Puerto Rican children to their natural parents.

The district court's requirement that an adversary hearing be held before children voluntarily and temporarily placed in foster care for more than one year are returned to their natural parents, has a disproportionate impact upon the Puerto Rican family. While Puerto Ricans comprise only 10% of the total population of New York City, 25.5% of all children in foster care placement in New York City are Puerto Rican.² Moreover, at least 68.9% of Puerto Rican children in foster care in New York City have

² David Fanshel and John Grundy, "Computerized Data for Children in Foster Care", Table 2: Ethnicity of Children in Foster Care, November, 1976, (published by Child Welfare Information Services, 200 Madison Ave., New York, New York).

been voluntarily placed into foster care.³

Initial voluntary foster care placement in New York, as reflected in State statutes, is designed and intended to be a temporary arrangement where the family is briefly separated to be reunited when transient familial problems have been resolved.

The impact of the district court's decision is to place an unnecessary obstacle to maintaining Puerto Rican family unity already threatened by unemployment,

³ Id. at Table 21: Court adjudicated Status of Children in Foster Care. To determine the percentage of voluntary placements three categories were combined: "No Court Involvement;" "#392-FC Reauthorized;" and, "#358A-FC Approved." These three categories apply only to voluntary placements.

inferior education and poverty.

The Institute and PRACA request leave to file the attached brief amici curiae in order to focus the Court's attention on selected issues raised by this appeal and upon the adverse impact of the district court's decision on the Puerto Rican family.

Respectfully submitted,

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⁴ A recent report of the United States Commission on Civil Rights, Puerto Ricans in the Continental United States: An Uncertain Future, October, 1976, documents the poverty, unequal educational opportunity, language barriers, unemployment and family disintegration plaguing Puerto Ricans.

INTEREST OF AMICI CURIAE

The interest of the amici curiae is set forth in the accompanying motion, supra.

QUESTIONS PRESENTED

- 1) Whether a case or controversy is present in this case to confer jurisdiction upon the district court under Article III section 2 of the Constitution of the United States to determine that New York Social Services Law §§ 383(2) and 400 (McKinney 1976) and the New York Code of Rules and Regulations § 450.10 (1974) violate the rights of foster children under the due process clause of the Fourteenth Amendment to the Constitution of the United States?
- 2) Whether New York Social Services Law §§ 383 (2) and 400 (McKinney 1976) and the New York Code of Rules and Regulations § 450.10 (1974) violate the due

process clause of Fourteenth Amendment to the Constitution of the United States insofar as they authorize the State to return to natural parents their children who were voluntarily and temporarily placed into foster care without providing foster parents and foster children a full evidentiary hearing in an organized forum?

INTRODUCTION AND
SUMMARY OF ARGUMENT

This is a case involving an omnibus attack by foster parents upon the constitutionality of state procedures accorded foster parents prior to the removal or transfer of foster children boarding in their home. In response to this attack, the district court granted due process rights to children who opposed the imposition of additional procedures.

Amici do not submit this brief in order to present the Court with exhaustive argument on the application of due process to the removal or transfer of

foster children. It is the purpose of this brief to isolate certain issues respecting procedures required prior to the return to natural parents of children voluntarily placed into foster care raised by the lower court opinion and to demonstrate the following: 1) the district court had no jurisdiction to determine that children voluntarily placed into foster care are entitled to an evidentiary hearing in an organized forum before they are returned to their natural parents; and, 2) foster parents are not entitled to a due process hearing as imposed by the lower court in addition to constitutionally adequate state procedures already accorded to them, prior to the return to natural parents of voluntarily placed foster children.

The foster parents commenced this action on behalf of themselves and the

foster children jointly, asserting a right to a due process hearing prior to the return of the children to their natural parents. Recognizing that foster parents and children have no identity of interest in this case, the lower court appointed independent children's counsel. The children's counsel consistently argued that foster children have a right to placement in their best interest which is satisfied by existing state procedures; that a federal court-imposed due process hearing is not in the children's best interest; and, that foster parents have no constitutionally cognizable interest in the foster family relationship. The district court's holding that children have procedural due process rights was grounded upon claims and arguments made by the foster parents who had no standing to raise those claims. Single-

ton v. Wulff, ___ U.S. ___, 49 L.Ed. 2d 826 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1952). By determining children's rights on the basis of claims made by a party who had no standing to raise them and opposed by the only party who had such standing - the children themselves - the district court adjudicated a matter which was not a case or controversy under Article III, section 2 of the Constitution of the United States. Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

In the instant case, foster parents seek due process protection for a voluntarily placed foster child boarding in their home under a written instrument which reserves to an authorized child care agency the sole discretion to terminate the placement at any time.

The foster parents present no liberty or property interest protected by the due process clause of the Fourteenth Amendment. Foster parents have no "legal entitlement" to the relationship within the meaning of Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972) and their progeny. The relationship is not within the zone of personal liberty and familial privacy recognized by this Court in Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 405 U.S. 205, 232 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); and Meyer v. Nebraska, 262 U.S. 390 (1923).

Even if the foster parent-child relationship is entitled to the protections of the due process clause,

existing review procedures already offer a constitutionally adequate opportunity to be heard prior to the return of a child to his natural parents. The requirements of due process are flexible and depend upon a balancing of the affected governmental and private interests, and the risk of erroneous determinations. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Mathews v. Eldridge, ___ U.S. ___, 47 L. Ed. 2d 18, 33 (1976). Where there are two conflicting private interests, the review procedures must accommodate both. Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).

The primacy of the natural parent-child relationship was recognized by this Court in Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345

U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). Under New York law, the parent of children voluntarily and temporarily placed in foster care do not relinquish their parental rights and they are entitled to the return of their children unless adjudicated neglectful, abusive, or otherwise unfit. New York Social Services Law §384-a (McKinney 1976).

Where the foster parent-child relationship has gone on for eighteen months or more, existing procedures provide the foster parents a full evidentiary hearing prior to the return of a child to his natural parents. Where the relationship has lasted less than eighteen months, the State, finding that the interests of the foster parents are minimal, still affords them a pre-termination conference to contest the return of the child to his

natural parents. In light of the State's interest in preserving and reuniting the natural family and protecting children, these procedures provide foster parents with an opportunity to dispute the return of the child to his home without unnecessarily delaying the reunion of the natural family or jeopardizing the welfare of the child. While the child may not initiate these proceedings, extensive child-care agency investigations and the opportunity for foster parent initiation of existing procedures adequately protect against erroneous decisions to reunite the natural family. Due process review procedures are fashioned to protect against error in "the generality of cases, not the rare exceptions." Mathews v. Eldridge, supra at 39.

Existing procedures strike a

constitutional accommodation of all the concerned private interests and the State's interests and effectively guard against erroneous determinations.

ARGUMENT

I

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE A MATTER WHICH WAS NOT A CASE OR CONTROVERSY UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES

This Court has consistently prohibited federal courts from assuming jurisdiction over and adjudicating issues in the absence of an actual case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States. Singleton v. Wulff, ___ U.S. ___, 49 L. Ed 2d. 826, 832 (1976); Warth v. Seldin, 422 U.S. 490, 498-99 (1976); Schlesinger v. Reservists To Stop The War, 418 U.S. 208, 215 (1974); United States v. Richardson, 418 U.S. 166, 171 (1974); Flast v. Cohen, 392 U.S. 83, 95-105 (1968); Baker v. Carr, 369 U.S. 186, 204-205 (1962); United States v. Raines,

362 U.S.17, 20-21 (1960). Courts may not hear and decide lawsuits where there is no genuine adversary issue between the parties.

Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 48 (1971); United States v. Johnson, 319 U.S. 302, 305 (1943); Muskrať v. United States, 219 U.S. 346, 361 (1911). Advisory opinions are forbidden, in part, in order to implement the separation of powers implicit in the Constitution and to confine the federal courts to the role assigned them by Article III.¹ Flast v. Cohen, *supra* at 96; United States v. Fruehauf, 365 U.S.

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The relationship between requiring federal courts to adjudicate only cases or controversies and maintaining a separation of powers was reflected in correspondence between then Secretary of State Thomas Jefferson and Chief Justice John Jay in 1793. In response to Secretary Jefferson's request to the Court for advice on the construction of certain United States laws and treaties, the Chief Justice replied:

We have considered the previous question...[regarding] the lines of separation drawn by the Constitution

146, 167 (1961). See also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring); Blair v. United States, 250 U.S. 273, 279 (1918); Liverpool, New York and Philadelphia Steamship Company v. Emigration Commissioners, 113 U.S. 33, 39 (1884).

In determining whether a case or controversy exists, and whether one party has standing to raise the rights of another, this Court has sanctioned a case by case assessment of relevant factors including whether there is a relationship

I Cont'd.

between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purpose-
ly as well as expressly united to

which insures equally effective assertion of rights, Singleton v. Wulff, supra at 833-34, or whether there is an obstacle to the assertion of rights by the individuals whose rights are at stake, NAACP v. Alabama, 357 U.S. 449 (1958). Any reasonable assessment of these factors should have compelled the district court to decline jurisdiction over the question of whether the children have a protected interest in the foster parent-child relationship within the meaning of the Fourteenth Amendment.

Appellee foster parents brought this action in the district court jointly on behalf of themselves and foster children. At the outset, the district court, recognizing that foster~~x~~ parents and foster children have no identify of

1 Cont'd.

the executive department. 3
H. Johnston, Correspondence and
Public Papers of John Jay, 486-
89 (1891).

interest in this litigation, sua sponte appointed independent counsel to represent the children. Through their counsel, the children have consistently asserted that they have no protected interest in the foster family relationship which mandates a due process hearing; that an adversarial due process hearing imposed by the federal courts is unnecessary and not in their interest; and, that the foster parents have no independent constitutionally cognizable interest in the foster family relationship.

Contrary to its threshold ruling that foster parents could not speak for the children, the district court ultimately superimposed upon the children arguments and claims which they had vigorously opposed throughout the litigation and which were made only by the foster parents who lacked the standing

to raise those arguments and claims. As a result, the district court found existing procedures constitutionally defective and imposed additional due process hearing requirements ostensibly for the benefit of the foster children who expressly eschewed a right to such procedures. It thus granted rights to foster children on the basis of constitutional claims not raised, indeed opposed, by the children - the only party who had standing to proffer them.

There was no obstacle to the children's assertion of their own rights and interests through their own independent counsel and no basis for the district court to grant the foster parents standing to raise the children's claims.

NAACP v. Alabama, 357 U.S. 449 (1958);

Barrows v. Jackson, 346 U.S. 249 (1952).

Where this Court has accorded standing to parents to raise children's claims, e.g. Wisconsin v. Yoder, 406 U.S. 205 (1972), there was no conflict between the rights of the children and the parents, and no independent counsel appeared for the children arguing a position contrary to that of the parents.

Only in limited contexts, where there was an identity of interests and an interdependence of rights sufficient to insure the equally effective advocacy of claims, has this Court granted standing to one party to raise the rights of others. See Singleton v. Wulff, *supra* at 833-34; Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

Since the only party who had standing to seek additional procedures in the

name of due process never raised the claim, and explicitly and continuously opposed such relief, the court below erred in assuming jurisdiction of the due process issue and ordering more elaborate procedures.

II

THE FOSTER PARENT-CHILD
RELATIONSHIP UNDER THE
CIRCUMSTANCES PRESENTED
IS NOT A PROTECTED IN-
TEREST WITHIN THE MEANING
OF THE DUE PROCESS CLAUSE
OF THE FOURTEENTH AMEND-
MENT TO THE CONSTITUTION
OF THE UNITED STATES

The due process requirements of the Fourteenth Amendment apply only where the liberty or property interest at stake rises to the level of a "protected interest." Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d. 18, 31 (1976); Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Perry v. Sinderman, 408 U.S. 593, 599 (1972). "Protected interests" include those interests created by federal or state statutes or derived from the existence of policies and practices promulgated by state officials and recognized by state law, Mathews v. Eldridge, supra at 32 (disability benefit payments);

Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (school suspension); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (cancellation of good-time credits); Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license suspension); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (welfare payments); or arising out of mutually explicit understandings, Perry v. Sinderman, 408 U.S. 593, 601 (1972) (non-tenured college employment); or involving a fundamental right, Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (right to personal liberty); Speiser v. Randall, 357 U.S. 513 (1958) (First Amendment rights); Slochower v. Board of Education, 350 U.S. 551 (1956) (Fifth Amendment rights); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (First Amendment rights).

The district court incorrectly found that children have a right to a hearing before suffering the "grievous loss" of separation from the foster parent-child relationship. Whether the deprivation of a protected interest amounts to a "grievous loss" determines the extent of the process due, not whether due process applies in the first instance. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d 18, 31-32; Goss v. Lopez, supra at 575-76; Wolff v. McDonnell, supra at 560-61; Goldberg v. Kelly, supra at 253. Since there has been no determination and indeed there can be none that the foster parent-child relationship in the circumstances presented is a "protected interest", the district court must be reversed.

In determining whether due process applies, the Court assesses the "nature of the interest at stake," and looks to state

law to define those interests. Board of Regents v. Roth, supra at 570; Goss v. Lopez, supra at 576. In this case, State law governs the entire system of foster care including the terms of the foster parent-child relationship. Children, temporarily and voluntarily surrendered to an authorized agency by their natural parents, are placed in State certified foster homes by the agency under a written instrument.² This contract, by its terms, provides for the payment of a boarding

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New York Social Services Law § 374 (McKinney 1976) authorizes placement of children in the care and custody of an authorized agency into foster homes. Foster parents must be certified by the agency to board minors under the age of eighteen and must be recertified each year. New York Social Services Law §§ 376 and 378 (McKinney 1976). An "authorized agency" as defined in New York Social Services Law § 371(10) (McKinney 1976) includes local public welfare children's bureaus and private voluntary child-care agencies under the supervision of the New York State Board of Social Welfare.

fee as well as clothing and medical costs.³ Most importantly, it reserves to the agency the right to terminate placement in the foster home at any time upon ten days' notice. Organization of Foster Families for Equality and Reform v. Dumpson, 411 F. Supp. 1144, 1148 (S.D.N.Y. 1976).

As the district court properly determined, the foster parent has no protected "property interest" in the foster parent-child relationship. The relationship is not within the meaning of a legal entitlement as defined by this Court in Board of Regents v. Roth, supra at 577 and Perry v. Sinderman, supra at 599 since

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The lower court noted that "[t]he defendant Catholic Guardian Society currently pays foster parents \$155 per month for each foster child boarded in their home, in addition to an allowance for clothing, medical, and dental expenses. This amount is typical of that paid throughout the state." Organization of Foster Families for Equality & Reform v. Dumpson, supra at 1149 n. 11.

its contractual basis nullifies any reasonable expectation of its uninterrupted continuation. There is no "mutual understanding" that the relationship will continue, Perry v. Sinderman, supra at 601.

It is equally clear that the foster parent-child relationship under the circumstances presented is not embraced by the fundamental right to personal liberty and familial privacy defined by this Court. This Court has protected the integrity of the natural family unit under the due process clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390 (1923), the equal protection clause, Skinner v. Oklahoma, 316 U.S. 535 (1942) and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479 (1965). The rights to conceive and raise one's natural children are deemed "essential," Meyer v. Nebraska, supra at 399, one of

the "basic civil rights of man," Skinner, supra at 541, and far more precious than property rights, May v. Anderson, 345 U.S. 528, 533 (1953). This Court has stated that "[i]t is cardinal that the custody, care, and nurture of the child reside first in the [natural] parents" Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Only a powerful countervailing interest warrants infringement upon the natural parents' interest in the children he or she has sired. Stanley v. Illinois, 405 U.S. 645, 651 (1972). As stated by this Court in Wisconsin v. Yoder, 406 U.S. 205, 232 (1972):

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

This Court's deference to the natural family derives support and authori-

ty from the Congress. Title XX of the Social Security Act under which funds are provided to the states for social services programs including foster care services, express our national goal to "preserve rehabilitate, and reunite families." 42 U.S.C.A. 1397 (3). Further, New York State provides, as part of its foster care services, "counselling with the parent... to improve home conditions and enable such child to return home...as soon as it is feasible."⁴

The foster parent-child relationship here is circumscribed by the terms of a contract reserving to the authorized agency discretion to remove the voluntarily-placed child at any time. That relationship deserves no deference under

4

The Comprehensive Annual Social Services Program Plan for the State of New York for the Years 1975-76 (Vol. I, September, 1975, at page 48) includes such counselling in its definition of foster care services.

the Court's formulation of the right to personal liberty and familial privacy. Unlike the protected family relationship, the foster family has no biological basis. Its duration is limited and indefinite. The foster parent takes custody of the child aware that return to the natural parent is possible at any time. The natural parents reasonably expect to continue the care, nurturing and upbringing of their children if familial conditions warrant, within the first eighteen months of the placement without the necessity of a formalized adversarial hearing.⁵ Since there has been no finding that the natural parent

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New York Social Services Law §392 (McKinney 1976) affords foster parents a full evidentiary hearing prior to the transfer or removal of the foster child after placement with the family for eighteen months or more.

is unfit, the natural parent retains the fundamental right to personal liberty and familial privacy which embraces the right to direct and control the upbringing of the child. Stanley v. Illinois, 405 U.S. 645, 650 (1972).

This Court need not determine whether in all circumstances the foster parent-child relationship rises to the level of a protected interest within the meaning of the Fourteenth Amendment. All that the Court need determine is that when, as here, the natural parent is fit, the foster placement is voluntary and temporary, the foster parents knew and understood the child could be returned to the natural parent at any time and in the placing agency's sole discretion, the foster parent-child relationship is not a protected interest within the meaning of the due process clause.

III

ASSUMING THE FOSTER PARENT-CHILD RELATIONSHIP UNDER THESE CIRCUMSTANCES IS PROTECTED BY THE DUE PROCESS CLAUSE, THE RIGHT TO A HEARING PRIOR TO RETURNING THE CHILD TO THE NATURAL PARENTS IS ALREADY SATISFIED BY EXISTING REVIEW PROCEDURES.

Even if the foster parent-child relationship is a protected interest within the meaning of due process, existing procedures for pre-termination review of decisions to return children voluntarily placed in foster care to their natural parents are constitutionally sufficient.⁶ The substitute procedures ordered by the lower court are unnecessary and inappropriate under the circumstances of this case: they will only

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New York Social Services Law §384-a(1) (McKinney 1976) permits temporary surrender of the custody of destitute children to authorized agencies.

create another bureaucratic overlay in a system which must avoid manipulating and ultimately destroying a parent-child relationship through a time-consuming and anxiety-producing administrative labyrinth.

It is well settled that the "very nature of Due Process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Instead, the procedural safeguards required by due process depend upon the particular situation and the particular governmental and private interests involved. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Determinations of the constitutional adequacy of administrative review procedures call for the

assessment and balancing of three factors:

[F]irst, the private interest that will be affected by public action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the governments interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d 18, 33 (1976).

Accord, Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1961).

Applying these factors against the backdrop of the review procedures available to foster parents under state statutes and regulations shows that under the test enunciated in Cafeteria and Restaurant Workers Union, supra, and its progeny, due process is satisfied in

this case.⁷

Existing State Statutory And Regulatory Review Procedures

Under local regulations, 18 N.Y.C. R.R. §450.10 (1974) foster parents are notified of proposals to return children voluntarily placed in foster care to their natural parents and are advised of their right to request a conference with the authorized agency making the decision. At this pre-termination conference, foster parents, who may be accompanied by a representative, are advised of the reasons for the proposed return of the child to its natural parents and may "submit reasons why the child should not be removed" from their care. 18 N.Y.C.R. R. §450.10(a) (1974).

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For the purposes of this brief, amici do not dispute the lower court's determination of the review procedures presently available, but its conclusion that these procedures are constitutionally inadequate.

New York Social Services Law §392 (McKinney 1976) affords foster parents with children in their care for eighteen months or more an additional opportunity to contest the return of a child to its natural parents prior to the child's removal from the foster home. This section requires authorized agencies charged with the custody and care of the child to petition the Family Court for a review of foster care status (hereinafter "§392 review") eighteen months after the child has been in a foster home. New York Social Services Law §392(2)(a) (McKinney 1976). Foster parents and natural parents may also petition for the §392 review. New York Social Services Law §392(2)(c) (McKinney 1976). After the initial §392 review, the family court retains jurisdiction and conducts subsequent review proceedings upon the

request of the authorized agency, foster parents, natural parents or upon its own motion, but at least every two years. New York Social Services Law §392(10) (McKinney 1976). In situations where the child was voluntarily placed in foster care by the natural parents, the court enters an order of disposition at each §392 review directing that foster care be continued, that the child be returned to the natural parents, or that proceedings be initiated to free the child for adoption. Social Services Law §392(7) (McKinney 1976).

Since §392 reviews are governed by the New York Civil Practice Laws and Rules to the same extent as other Family Court proceedings, foster parents receive a full evidentiary hearing including an impartial hearing officer, the right to present, confront and cross-

examine witnesses, and the right to⁸ counsel.

The decision of an authorized agency to return a child to its natural parents is not final. Once a child is returned to its home, the foster parents have the right to appeal to the local department of social services for a full hearing to contest the removal of the child from the foster home. New York Social Services Law §400(2) (McKinney 1976). If they are dissatisfied with the outcome of the appeal, they may petition for judicial review. Id.

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In In re L., 353 N.Y.S. 2d 317 (Fam. Ct. 1974), and Matter of Carla L., 357 N.Y.S. 2d 987 (App. Div. 1st Dept. 1974), N.Y. Social Services Law §392(McKinney 1976) was deemed to be a part of the Family Court Act and, thus, governed by the Civil Practice Law and Rules pursuant to §165 of the Family Court Act. (McKinney 1975). In addition, the foster parents have a right to counsel and to assigned counsel if they are indigent. (Chapter 682 Laws of 1975).

Existing Procedures Strike a Constitutional Accommodation of All Private Interests Affected By The Return of a Child To The Natural Parents

The precise nature of the opportunity to be heard depends on a balancing of the concerned private and governmental interests. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 18, 33 (1976); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Morrisey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951). This balancing process may involve a weighing of competing constitutional rights. Mitchell v. W. T. Grant Co., supra. Whether due process is triggered by a property or a liberty interest, the weighing process is the same.

Assuming that the foster parent-child relationship is entitled to the

protections of due process after only one year, the application of this balancing approach in this case reveals that the statutory and regulatory scheme "effects a constitutional accommodation of the conflicting interests of the parties". Mitchell v. W.T. Grant Co., supra at 607. Existing procedures recognize the primacy of the natural parent-child relationship without ignoring the interests of the foster parents or treating children as mere chattels.

Under New York law, People ex.rel., Kropp v. Shepsky, 305 N.Y. 465, 469 (1953), Spense Chapin Adoption Services v. Polk, 29 N.Y. 2d 196, 324 N.Y.S. 2d 937, 939 (Ct. App. 1971), as the court below recognized and accepted, the natural parent-child relationship enjoys a "primacy" which should not be disturbed unless a parent is unfit, has abandoned the child or

surrendered it for adoption. Organization of Foster Families for Equality and Reform v. Dumpson, 411 F.Supp. 1144, 1150 (S.D.N.Y. 1976). This principle is firmly established by the decisions of this Court in Stanley v. Illinois, 405 U.S. 645 (1972); in May v. Anderson, 345 U.S. 528 (1953), and Meyer v. Nebraska, 262 U.S. 390 (1923). Even the State's interest in the welfare of children is "de minimus" if the natural parent is fit. Stanley v. Illinois, *supra* at 658.

Voluntary placement in foster care is not a permanent commital, Social Services Law §384-a(4) (McKinney 1976); nor is it a relinquishment of the right to be free from state interference with the pre-eminent natural family relationship recognized by this Court in Meyer, *supra*; May, *supra*; and Stanley, *supra*. Boone v. Wyman, 295 F.Supp. 1143, 1149 (S.D.N.Y. 1969); aff'd 412 F.2d 857 (2d Cir. 1969);

cert. denied, 396 U.S. 1024 (1970); citing People ex rel. Anonymous v. N.Y. Foundling Hospital, 12 N.Y. 2d 863 (Ct. App. 1962). Under the temporary surrender agreement signed by the natural parents, there is every expectation that this family unit will be reunited as soon as circumstances permit. New York law requires that the temporarily surrendered child be returned to the natural parents within ten days of their request, unless it would be contrary to the terms of the surrender agreement, or an order issued in a §392 review, or the parent has been adjudicated neglectful, abusive, otherwise unfit or to have abandoned the child. New York Social Services Law §384-a(2) (McKinney 1976). No inference of parental unfitness arises from voluntary placement. On the contrary, local regulations of the New York City Department of Social Services prohibit accept-

ance of voluntary placements where there is a possibility of child abuse or neglect, requiring instead that the agency report these cases to the Central Registry of Child Abuse for investigation and the institution of judicial proceedings to terminate parental rights, if indicated.⁹

Unlike the natural parent-child relationship, eventual termination is an element of the foster parent-child relationship where custody of the child has been surrendered only temporarily by the natural parents. New York Social Services Law §§383(2) & 400(1) (McKinney 1976) and the foster care contract itself

⁹ The City of New York - Human Resources Administration, Department of Social Services - Special Services for Children, SSC Procedure No. 21 III A.1. (February 18, 1976) (Appendix) provides in relevant part: "A planning caseworker shall not accept a...Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect." New York Social Services Law §422 (McKinney 1976) authorized the establishment of the Central Registry of Child Abuse.

acknowledge the right of the authorized agency to remove the child from the foster home.¹⁰ As part of this process, foster parents are accorded a full evidentiary review under Social Services Law §392 (McKinney 1976) after the child has been in foster care for eighteen months or more.

Although the weight attached to a "liberty" interest does not determine the applicability of due process in the first instance, it is a factor in determining how extensive and elaborate process should be. Goss v. Lopez, 419 U.S. 563, 576 (1975). This is especially true

¹⁰ Organization of Foster Families for Equality and Reform v. Dunson, 411 F.Supp. 1144, 1148 (S.D.N.Y. 1976): "The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves the agency the right to recall the child 'upon request, realizing that such request will only be made for good reason.'"

when, as here, two competing interests must be accommodated. Determining that the interests of the foster parents are minimal before eighteen months of foster care, the State still affords these foster parents the opportunity to request a pre-termination conference to contest the return of the child to its natural parents by challenging their fitness. Where a child has been temporarily surrendered to an authorized agency, the only grounds for refusing to return the child to his natural parents is their fitness; not the superiority of foster care. New York Social Services Law §384-a(2) (McKinney 1976).

The court below in ordering more extensive procedures failed to consider the impact on the natural parent-child relationship of further delays on their anticipated reunion.

The State's Interests

The function of the State in providing temporary foster care to destitute children whose parents are unable to care for them because of transient circumstances is to preserve the natural family unit and to protect children.¹¹ These are compatible and need not be competing interests. Decisions to return these children to their parents once the circumstances that separated them are ameliorated reflect these State

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The Comprehensive Annual Social Services Program Plan for the State of New York for the year 1975-1976 (Volume I, September, 1975 at page 48) includes in its definition of foster care services "counseling with the parent... to improve home conditions and enable such child to return to his home...." New York Social Services Law §398(2)(a) (McKinney 1976) requires public welfare officials to "[i]nvestigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible"

interests. By imposing more extensive hearing procedures, the district court delays realization of the State's objective of maintaining natural family relationships. The review procedures in the child care system are tailored to the purpose of that system: responding to the needs of children and their families.

In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), "the balance of hurt complained of and good accomplished" was identified as an important consideration in due process analysis. Recognizing the value of preserving the natural family, the State has fashioned procedures which accomplish this goal. Once the obstacles that separated the family are overcome, an expedited process is employed with the aim of reuniting parent and child, without depriving the foster family of a fair

opportunity to raise objections to this reunion.

State policy of protecting children is also best served by the less complex review procedures presently available. Parents will be discouraged from placing children in the temporary care and custody of public child care officials when circumstances require it, if regaining custody is unduly delayed, problematic, and fraught with unnecessary procedural obstacles.

The judgment of the State legislature regarding pre-termination procedures best suited to accommodate all the diverse private and governmental interests involved in temporary foster care should not have been disturbed by the court below. Particularly where the procedural scheme is fair and seeks to minimize the risk of error; Cf. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 18, 41 (1976); Ar-

nett v. Kennedy, 416 U.S. 134, 204 (1974).

Courts should not substitute their judgment for that of the state legislatures.

Existing Procedures Adequately Safeguard
Against Erroneous Decisions To Return A
Child To Its Natural Parents

The administrative decision to return a child temporarily placed in foster care to his natural parents requires only that the agency determine that the natural parents once again are able to care for their child. The adequacy of the foster care received by the child is not at issue. Disregarding the voluminous information already gathered and in the possession of child care agencies, the district court cited the need for an "organized forum" to gather necessary information in ordering substitute review proceedings. Organization of Foster Families For Equality and Reform v. Dumpson, 411 F. Supp. 1144, 1150 (S.D.N.Y. 1976).

A voluntary placement is accepted by an agency only after a diagnostic intake study to examine the family situation is performed. 18 N.Y.C.R.R. §606.14(a) (1976). This study is designed to reveal any indices of possible child abuse or neglect which would preclude voluntary placement and require involuntary termination of parental rights pursuant to Article 10 of the Family Court Act, §1012 et seq. (McKinney 1975).¹² Once a child is accepted into foster care, an agency worker must meet with the natural family every two weeks during the first three months of placement and once a month thereafter. 18 N.Y.C.R.R. §606.15(b)(2) & (3) (1976).

¹²

New York City Department of Social Services-Special Services For Children, Procedure No. 21, III A. 1., (February 18, 1976) provides that a "caseworker shall not accept a...Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect."

Foster parents and the children temporarily in their care are also interviewed on a regular basis. The information elicited in these conferences is used to assist the families involved and is also maintained in case files. Thus, sufficient information is available to the child care official from agency worker investigations and conferences to guard against the risk of erroneous determinations of parental fitness.

Fault was also found with the pre-termination conference held by the child care official with foster parents because "the public official with whom they confer is already acquainted with the agency's version of the background facts." Organization of Foster Families For Equality and Reform v. Dumpson, 411 F. Supp. 1144, 1151 (S.D.N.Y. 1976). Prior knowledge of the agency's information regarding the fitness of a natural parent does not prevent a child care official charged with protecting child-

ren's welfare from rendering an impartial and correct decision. Withrow v. Larkin, 421 U.S. 35, 47-55 (1975); Richardson v. Perales, 402 U.S. 389, 410 (1971). In fact, any agency official who disregards reasonably based foster parent claims of past or potential child neglect or abuse by natural parents would be criminally and civilly liable. Social Services Law §420 (McKinney's 1976). In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), one of the factors identified for assessing the process due in a particular situation was the "protection implicit in the office of the functionary whose conduct is challenged." In any event, familiarity of the initial decision maker with the facts does not compromise due process requirements where subsequent reviews by impartial decision-makers are available. Arnett v. Kennedy, 416 U.S. 134, 170 (1974).

The lower court also erred in ruling that the procedures were constitutionally defective by failing to guarantee foster parents the right to present witnesses. The right to present witnesses, an element of an evidentiary hearing, is not always required by due process. In Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d 18, 37 (1976), this Court found that an evidentiary hearing with an opportunity to present witnesses was not required prior to the termination of disability insurance benefits although the recipient would suffer a significant deprivation. Similarly, in Wolff v. McDonnell, 418 U.S. 539 (1974) even though the deprivation of "good-time credits" which affect the eligibility date of prison inmates for parole was labeled a "grievous loss," an evidentiary hearing with the right to present witnesses was not determined as

necessary for purposes of due process. In fact, "[o]nly in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation." Mathews, supra at 36. Due process may be satisfied through informal conferences and a formal hearing need not be conducted in an "organized forum." In Goss v. Lopez, 419 U.S. 565, 582 (1975), this Court found that an informal conference between a high school student and the principal or other disciplinarian prior to suspension of the student would satisfy the requirements of due process.¹³

¹³

The failure to provide an opportunity to present witnesses is particularly reasonable within the context of the New York child care system. A foster parent need not substantiate claims of parental unfitness with witnesses before the child care official must take action to prevent further harm to the child. See discussion of §420 Social Services Law (McKinney's 1976), supra at 49.

State law, New York Social Services Law §392 (McKinney 1976), permits the foster parents of children in foster care for eighteen months or more to petition the family court for a review which accords foster parents a full evidentiary hearing.¹⁴ No reason was given by the lower court for substituting its judgment for that of the New York legislature in requiring that a formal hearing be accorded to foster parents after only one year rather than after eighteen months.

The Court erred in finding that the existing pre-termination procedures, both the conference and the §392 review for

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The review proceedings available under §392 Social Services Law (McKinney's 1976) are described on page 33 supra.

placements of eighteen months or more, were constitutionally deficient because the child could not initiate either, nor participate in the conference. Reunion of the natural family may be prevented only if the natural parent is adjudicated neglectful, abusive or demonstratively unfit. Social Services Law §384-a(2) (McKinney's 1976). It is a rare exception where the child care agency, through its on-going investigations and authorization to initiate proceedings to terminate parental rights, and the foster parent through initiation of existing procedures will fail to protect the child's interest in being returned only to a fit parent. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exception." Mathews v. Eldridge, __U.S.__,

47 L.Ed. 18, 39 (1976).

By ordering that formal pre-termination procedures be initiated automatically in all cases, the district court responded to the rare exception that the unfitness of a parent will not be revealed under the present scheme. These additional, unnecessary safeguards present greater bureaucratic obstacles to the realization of the state and natural parents and children's interests in the reunion of the natural family.

CONCLUSION

For all the foregoing reasons, the decision of the district court should be reversed insofar as it imposes additional procedures before a voluntarily placed child is returned to the natural parent.

Dated: November 22, 1976

Respectfully submitted,

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(Appendices Follow)

APPENDICES

APPENDIX A

THE CHALLENGED STATUTES
AND REGULATIONS

New York Social Services Law §383
(2): The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

New York Social Services Law §400:
Removal of Children.

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on

its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied by the public welfare officials thereof.

18 N.Y.C.R.R. §450.10* Removal from foster family care.

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and re-

* This regulation was numbered 450.14 until September 18, 1974.

quire any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster

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care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

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APPENDIX B

THE CITY OF NEW YORK -
HUMAN RESOURCES ADMINISTRA-
TION DEPARTMENT OF SOCIAL
SERVICES - SPECIAL SERVICES
FOR CHILDREN

SUBJECT: VOLUNTARY PLACEMENT AGREEMENTS

TO : Executive Directors, Voluntary
Child Care Agencies Staff,
Special Services for Children

FROM : Carol J. Parry, Assistant
Commissioner Special Services
for Children

SSC PROCEDURE NO. 21
February 18, 1976

III. GENERAL INSTRUCTIONS

A. Possible Child Abuse or Neglect
Situations

1. A planning caseworker shall not accept a Form W-864, Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect; regardless of whether the situation came to SSC's attention through a report to the Central Registry, by other source of referral, or by personal application; and, even if the parent or guardian desires removal of the child

2b

from the home and is willing to sign a Voluntary Agreement. If such a situation has not already been reported to the Central Registry, the caseworker shall make a report immediately.

DEC 18 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-180, 76-183, 76-5193, 76-5200

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO, on behalf of themselves and all others similarly situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

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BRIEF AMICUS CURIAE,
COMMUNITY SERVICE SOCIETY OF NEW YORK

INTEREST OF AMICUS

The Community Service Society [hereinafter "the Society"] is the oldest and largest social service agency in the country. The Society was organized in 1848 for the purpose of aiding the poor and disadvantaged in the City of New York.

The Society's Department of Public Affairs is composed of eight program committees, which study critical social issues and engage in public advocacy to foster the development and adoption of sound social welfare policies. The Committee on Social Services, one of the eight Public Affairs committees, has been principally concerned with child welfare policies and the programs which affect children and their families in New York City.

Members of the Committee on Social Services bring diverse views and experience to bear

upon the issues they consider. The membership includes a plaintiff foster parent in the instant case; the attorney for plaintiff foster parents and a principal, expert witness called by the defendant-intervenors and relied upon by several other parties. In addition, the Society's Executive Director has been called upon to give expert testimony in the instant case.

The Society, through the Committee on Social Services, works closely with other organizations, both private and public, in its efforts to encourage and maintain high quality services for New York City's children. It frequently testifies with respect to proposed legislation and administrative changes that affect child welfare programs, reviews and comments on policy positions affecting child welfare services, and proposes changes it considers desirable. Early in 1977, the Society will issue a background paper which reviews the

history and current status of New York City's foster care system.

In addition to these public affairs activities, the Society operates eleven demonstration programs, which offer a variety of social services directly to the public. Many of these programs serve families whose children are in foster care. As a result, the Society is fully familiar with the practical needs of these parents and children, and with the tensions created by the operation of the foster care system among parents, children, agencies and foster parents.

All parties have consented to the Society's submission of a brief Amicus Curiae, in which the issues addressed will be limited to those with substantial public policy consequences.

FOSTER CARE IN NEW YORK STATE

Foster care is a social service offering substitute care for children whose own families

are temporarily unable to care for them.

Temporary custody is transferred to an official of a public welfare agency, or of a private, voluntary agency. Private agencies are authorized and regulated by the state and receive public funds under purchase of service contracts. These custodians then place the foster child in institutions, or small group homes run by public or private voluntary agencies, or in the home of a foster family who receives a compensatory stipend for the expense of room, board and care.

Most placements in New York are the result of voluntary agreements between families and agency social workers pursuant to N.Y. Soc. Serv. Law §384-a (McKinney 1975). Some are the result of court orders, for example, in child abuse and juvenile delinquency proceedings. N.Y. Fam. Ct. Act §1055 (McKinney 1975); N.Y. Fam. Ct. Act §756 (1975), respectively.

In cases of voluntary placement, the custody

transfer is temporary; it does not imply a change in the basic family relationship or the right of the child and parents to resume living together as a family after the problem necessitating the placement is ameliorated. The initial placement and the timing and choice of later transfers within the foster care system are left to the agency staff and officials.

New York statutes provide for review of some agency actions in some foster care situations. See, N.Y. Soc. Serv. Law §§392, 400 (McKinney 1975). However, there is no right to a full administrative or court review prior to a child being removed from one placement to another.

SUMMARY OF ARGUMENT

As a matter of sound child care policy, a foster care agency's action to return children in voluntary foster care to their natural parents should not be subject to administra-

tive review. A review hearing, however, should be required in every case in which an agency acts to transfer a child from one foster care placement to another. This procedural difference is justified by the different legal rights and policy considerations presented by the two situations.

In voluntary placement cases, a decision to return a child home is not discretionary. Child welfare practice is based on the importance and value of family relationships. In the absence of neglect or abuse, no state interference with the parental right to the care and custody of their children is permitted. When misfortune or crisis leave parents temporarily unable to care for their children, foster care is a service designed to enable parents to ensure care for their children and to help children understand and cope with the emergency.

For privately arranged, substitute care

with grandparents, other relatives or even friends, there is no due process right to a hearing prior to return home. Voluntary care is analogous. Review of a foster care agency's decision or action to return a child home is an unwarranted reduction of parental rights based upon the value and integrity of the family.

Review should be mandated, however, when an agency acts to transfer a child within the foster care system. These decisions are discretionary and administrative. They affect the child's liberty and the quality of care he receives at a time when a public agency or its delegates stand in loco parentis. The child has a due process right to a hearing.

ARGUMENT

I

THE COURT BELOW ERRED IN
REQUIRING A HEARING TO
REVIEW AGENCY DECISIONS
TO RETURN VOLUNTARILY

PLACED CHILDREN TO THEIR
PARENTS.

A. A HEARING REQUIREMENT IS CONTRARY TO THE CONSTITUTIONALLY GUAR- ANTEED RIGHTS TO FAMILY PRIVACY AND INTEGRITY.

The rights of parents to the care and custody of their children are protected by the United States Constitution and are fundamental to the structure of our society. See, Weinberger v. Wiesenfield, 420 U.S. 636 (1974) (due process clause, XIV Amendment); Stanley v. Illinois, 405 U.S. 645 (1972) (due process clause, XIV Amendment); May v. Anderson, 345 U.S. 528 (1953) (due process clause, XIV Amendment). These rights are based upon the personal, independent right to liberty, Meyer v. Nebraska, 262 U.S. 390 (1923) (due process clause, XIV Amendment) and include the family's right to privacy Griswold v. Connecticut, 381 U.S. 479 (1965) (IX Amendment), and integrity, Stanley v. Illinois, supra at 651.

Protected by these constitutional rights, families are free to raise their children as they choose within very broad limits. They are restricted primarily by protective laws which serve as the basis for state intervention when a child is endangered by the neglect or abuse of the parents. See, e.g., N.Y. Fam. Ct. Act §1011, (McKinney 1976). The law in New York State recognizes the rights of parents and the limited ability of the state to intrude into the sphere of family relationships. "The state may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." Bennett v. Jeffreys, No. 381, N.Y. Ct. App. (Sept. 21, 1976).

In finding that, after one year in voluntary foster care, a hearing is necessary before children may be returned to their families, the Court below has provided the state with a novel intrusive power, applicable only to

families whose children are being cared for within the formal foster care system. This is a serious discrimination that was never intended by our child welfare system.

The parental right to custody is consistent with the basic policies underlying America's social welfare practice and programs. The development of these programs, since the beginning of this century, has been rooted in the recognition of the importance of the family and the principles that children are best served by being raised within their own homes and families.

The 1909 White House Conference on Children provided the first clear policy statement to this effect and gave rise to mother's pension programs in many states and to the Federal Aid to Dependent Children program. A. Kadushin, Child Welfare Services 156, 226, 399 (2d ed. 1974). These programs provided subsidies to

keep the homes of poor families intact for the benefit of the children. Later, service programs designed to preserve stable homes for children were added. Currently state social service programs receive federal funds on a matching basis through Title XX of the Social Security Act, 42 U.S.C.A. §1397-a(a)(1)(c) (1976). See also, N.Y. State, 1976-77 Comprehensive Annual Social Services Plan 3.

Accordingly, the recognized professional standards in the area of foster care provide as the first basic practice principle: "The primary aim of all child welfare services is to preserve and strengthen the child's own home wherever possible...." Child Welfare League of America, Standards for Foster Family Service §0.7 (Revised ed. 1975) [hereinafter "CWLA Standards"].

Accordingly, the New York State foster care system is a service to the natural family. Voluntary foster care placement offers

substitute child care when, because of parental illness or other temporary crisis, children cannot be cared for in their own homes. If no family member or friend can help, and the family cannot afford to purchase substitute care, the child may be voluntarily placed by the family into the custody of the state which provides and pays for foster care.^{1/}

New York law requires a written agreement pursuant to N.Y. Soc. Serv. Law §384-a. The agreement's terms anticipate a limited stay in foster care and the child's return home. Thus, voluntary foster care placement is similar to other temporary transfers of custody, for example, to boarding schools and summer camps which are sometimes used for

^{1/}For cases which involve federal funding through the Aid to Families with Dependent Children (AFDC) Program, 42 U.S.C.A. §601 (1974); 42 U.S.C.A. §602 (1976), the additional procedure found in N.Y. Soc. Serv. Law §358-a (McKinney 1976) is required to meet the requirements of 42 U.S.C.A. §608(a)(4)(A) (1974).

similar purposes and which require similar medical waivers and releases.

The laws protecting children from neglect and abuse, see e.g., N.Y. Fam Ct. Act §1011 et seq. (McKinney 1975) apply to children in foster care. If an agency fears for a child's safety at home, a protective court proceeding can be initiated while the child is still in placement. See, N.Y. Soc. Serv. Law §384-a. In cases where foster placement is involuntary, as, for example, after a finding of child abuse, court approval is necessary before an agency can return a child home. N.Y. Fam. Ct. Act §1054 (McKinney 1975).

Absent court intervention, however, parents of voluntarily placed foster children retain the right to the care and custody of their children. They retain "the full right to have the child returned to them upon request."

CWLA Standards §2.2.

The hearing mandated by the Court below delays the child's return home and subjects the parents' absolute right to custody to a review procedure, thereby imposing, or at least implying, agency discretion in responding to requests for the return of voluntarily placed children. In so doing, it interferes with the constitutionally protected rights of family privacy and integrity and contravenes the written agreement of the parties.

B. FOSTER PARENTS HAVE NO
RIGHT OR INTEREST TO
CHALLENGE AGENCY DECISIONS TO RETURN CHILDREN
HOME.

The Court below was correct in failing to find any constitutionally protected interest or right in the foster family relationship. However, the Court should have gone further and decided that the interests of the foster family are inferior to that of the natural parents. Amended Opinion, at 8-9.

The conclusions concerning the "psychological parent" propounded by J. Goldstein, A. Freud and A. Solnot, in their book Beyond the Best Interest of the Child (1973) upon which plaintiff foster parents rely are disputed. See, e.g., A. Kadushin, Book Review, 48 Social Service Review 508 (1974); D. Katkin, B. Bullington & M. Levine, Book Review, 8 Law & Society Review 669 (1974); P. Strauss & J. Strauss, Book Review, 74 Col. L. Rev. 996 (1974)[hereinafter "Strauss & Strauss"]. Indeed, the inability to predict the benefits of, or to identify the psychological family relationship is acknowledged by the authors. Goldstein et al., supra at 6, 49-52, 63, 83-84, and 146-148. If the position of the plaintiff foster parents were accepted, foster care service providing temporary substitute child care would be unworkable, as its intent requires foster parents to play a role supportive of the child's relationship with his

own family. See, e.g., A. Kadushin, Child Welfare Services 432 et seq. (2d ed. 1974); CWLA Standards, §4.31.

C. CHILDREN HAVE NO RIGHT
OR INTEREST TO CHALLENGE
AGENCY DECISIONS TO RE-
TURN THEM HOME.

A child has a constitutionally protected right to live together with his natural or adopted family supra p. 8; he has no right to live away from home. See, N.Y. Fam. Ct. Act §718 (McKinney 1975).

There is no precedent for permitting the preference of a child to determine his parents, his home or his family. Indeed, a child has no right to dictate his own custody. Boarding schools, summer camps, relatives and live-in employees often assume temporary custody of children without giving rise to the right of the child to prefer that living arrangement to his family and home. There is nothing in the concept of temporary foster care placement

that suggests that a different consequence should follow.

If we recall that most foster children are poor and most foster parents at least somewhat financially better off, see, e.g., M. Rein, T. Nutt & H. Weiss, Foster Care: Myth and Reality, in Children and Decent People 24 (A. Schorr, ed. 2d ed. 1974) the possibility that a child might express a preference to remain in what is nearly always, from an economic viewpoint, a "better" neighborhood, school and home is not surprising. But even if the home were also found to be "better" psychologically and emotionally, the state has not undertaken to guarantee or to pay for substitute care, however much "better" it might be, for children whose families are able to provide adequate care in their own homes. Perhaps one important reason why the state has not done so is the inability of any institution or professional group to balance

accurately and predict which of two homes would be "better" for a child's care and upbringing when one is provided by the child's own family.

While an exception should perhaps be made for children in foster care for extended periods, in the majority of cases this need could easily be met within the context of the foster care court review under N.Y. Soc. Serv. Law §392 particularly if children were made independently represented parties. Section 392 review has proved effective in limiting the time children spend in foster care without a permanent plan for their future. T. Festinger, The Impact of the New York Court Review of Children in Foster Care: A Follow-up Report, 60 Child Welfare 515 (Sept./Oct. 1976). This review is likely to make the occurrence of long, unplanned foster care stays (such as the plaintiff children in this case have known) less frequent in the future.

D. A HEARING REQUIREMENT
WOULD UNDERMINE THE
VALUE OF VOLUNTARY
FOSTER CARE SERVICE
PROGRAMS BY DISCOUR-
AGING THEIR USE.

The very existence of the hearing procedure implies the possibility that, even in the absence of abuse or neglect, children in foster care might not be returned to their family. Knowledge of the hearing procedure and the ensuing delays can only discourage the use of foster care service. A refusal by a parent to use foster care when it is needed will leave children in danger of being harmed by inadequate substitute care arrangements and possibly deprive them temporarily of any care at all. See, Strauss & Strauss, supra at 1006-08.

In practice, the existence of a hearing has a chilling effect upon custodial rights regardless of the standards applied. A review of the decision to return a child home is by its very nature inconsistent with the notion,

recognized by the Court below, Amended Opinion at 10-11, that return home is not discretionary.

The foster care system has often seemed to work against the families it serves. The failure to provide natural parents with promised services intended to ease or resolve the difficulties which necessitated placement is one of the most frequent criticisms of the foster care system. "...[T]he focus and time limitations of the workers are such that efforts tend to be geared away from the natural parent and toward the foster home..." E. Sherman, R. Neuman, & A. Shyne, Children Adrift in Foster Care 5 (1973). Visitation is made difficult by placements distant from the parents, by agency-imposed schedules and limitations, and by lack of adequate public transportation which is especially necessary for poor urban families. See, e.g., S.

Jenkins, & E. Norman, Beyond Placement 65-66 (1975).

In this context, a procedure which impedes the return of children to their homes only serves to reinforce the factors in the system that weigh against the status and rights of parents.

The actual delay as well as the implication that there is a basis to review a decision to return a child home is more restrictive than current practice. The structure of the hearing itself presents an apparent shift in the position of the parties as all appear on equal footing to present their views of what the child wants or needs or should have.

A comparison between the homes offered by the parents and the foster parents is inevitable. The intensity and value of the family bond is far less visible than the material benefits generally offered by

foster parents. It must be expected that to some degree a natural tendency on the part of the middle-class professional reviewer to favor the more socially acceptable and economically superior home will be acted upon despite a contrary legal standard.

Even if legal standards are scrupulously respected, parents will perceive a limitation of their right to custody in the very fact of the adversarial hearing and the concomitant delay in returning their children home. This perception is as likely to lead to a reluctance to make use of foster care as an actual application of more restrictive standards.

II

THE DECISION OF THE COURT
BELOW TO MANDATE DUE PRO-
CESS REVIEW PRIOR TO RE-
MOVAL OF A FOSTER CHILD
SHOULD BE AFFIRMED WHERE
REMOVAL IS TO OTHER THAN
THE NATURAL PARENTS.

A. DUE PROCESS REQUIRES REVIEW
OF AGENCY DECISIONS TO RE-
MOVE FOSTER CHILDREN TO
PLACEMENTS OTHER THAN WITH
THEIR NATURAL FAMILY.

While the decision to return children home is not discretionary, all other removal decisions are discretionary, and are based, not upon the protected right to custody, but upon administrative judgments. These judgments affect the liberty of the child and the quality of his care. Procedural due process review is required.

Theoretically, the executive head of an authorized child welfare agency assumes the custody of a child placed in foster care and the responsibility to act in place of the parent to ensure the child's physical and emotional well-being. In practice, however, the agency executive does not and cannot act as a substitute parent. He is the head of a large bureaucracy, not a caring adult

who personally knows and is responsible for a particular child.

Most decisions concerning the thousands of foster care children are delegated to individual workers. They, in turn, however well-intentioned and competent, are overworked members of a bureaucracy that is not always responsive or sensitive to either social workers or children.

In New York City the problem is further complicated by delegating the care of most foster children to voluntary agencies through purchase-of-service contracts.^{2/}

^{2/} In New York City, although custody is normally assumed by the Commissioner of Social Services, about 85% of the foster care cases are delegated to state authorized, voluntary, child welfare agencies. T. Lash & H. Sigal, State of the Child: New York City 62 (1976). The 1975-76 New York City Budget lists 83 voluntary agencies receiving payments for foster care children. City of New York, Office of the Mayor, 1975-1976 Schedules Supporting the Executive Budget 655.

For these children, the city provides little or no monitoring. The New York State Department of Social Services has noted "...the continued inability of the city to establish a meaningful system to monitor the performance of the voluntary agencies with respect to children placed in their care." New York State Department of Social Services Metropolitan Regional Audit Office, Audit of Foster Care: New York City Department of Social Services 8 (August, 1976).

Facts do not support the identity of interest between the agency and the child noted in the dissent below. Dissenting Opinion, at 6-7. The plight of children "lost" and "forgotten" in foster care bureaucracies is well documented. Rein et al., supra at 38-39; Sherman et al., supra at 2-6. Equally acknowledged are the devastating effects of numerous placements, tem-

porary status and worker turnover on children in care. Id. at 41. None of this suggests an easy reliance on the agency for the protection and representation of the children's best interests.

B. HEARING PROCEDURES MUST
PROTECT CHILDREN'S DUE
PROCESS RIGHTS TO A
REVIEW.

In the context of New York's foster care system, foster parents are not appropriate spokesmen for the interests of their foster children. As recognized by the Court below, the interests of children and foster parents are not always identical and often will be in conflict. Amended Opinion at 13.

Foster parents manifest many different motivations and attitudes toward their role and toward their foster children, as well as different degrees of competence and emotional involvement. See, e.g., M. Wolins, Selecting

Foster Parents (1963). In one study, attitudes toward children "varied from accepting, to grossly rejecting, to idealizing, with the greatest cluster centered around ambivalence." Z. DeFries, S. Jenkins & F. Williams, Foster Family Care for Disturbed Children - A Non-Sentimental View, in Child Welfare Services: A Sourcebook 198 (A. Kadushin, ed. 1970).

The protection of the rights and interests of foster children should not depend on the sophistication or emotional commitment of their foster parents. Nor should children be vulnerable to the possibility of foster parents advancing their own interests and desires in the name of the "best interests of the child." Independent representation is necessary. Requiring a hearing in every instance is the most straightforward way of resolving the difficulties involved in providing representation for the purpose of

triggering a review.

Much of the seemingly burdensome expense of this solution might be eliminated by using, within the limits of due process requirements, intelligent and knowledgeable waiver of appearances to avoid full confrontation procedures. To be effective, this would require real representation of the child and the child's position by an independent children's advocate.

C. HEARING PROCEDURES MUST
BE INFORMAL AS WELL AS
CONSTITUTIONALLY PRO-
TECTIVE.

We agree with the Court below that trial-type hearings are not required to afford due process protection. Amended Opinion at 16. Indeed there are sound social policy reasons to encourage informality whenever possible. The decisions concerning the upbringing of a child and the best, or least destructive, way to meet the physical and emotional needs of a child, whether infant or adolescent, are

difficult ones under any circumstances. The fact of foster placement increases the difficulty. Procedures for review of removal and replacement decisions must be informal to encourage frank and extensive discussion by the child, the parent and the foster parent, those most directly and knowledgeably concerned.

Informal proceedings are most likely to minimize any existing tension between the parties involved and to avoid creating new ones. Finally, informal hearings are likely to offer the quickest route to a final decision, which is an important factor when, pending a hearing, children remain in foster homes found inappropriate by agency standards.

Ascertaining and representing the interests of children in accordance with full due process safeguards, while at the same time acting informally, rapidly and sensitively to the complex and delicate concerns involved, is a

dilemma of considerable dimension. If informality and speed are sacrificed, much will have been lost by children. In other contexts, administrative agencies have had difficulty in meeting judicial hearing requirements even when under explicit Court orders concerning named children. Festinger, supra at 524-28.

We believe it possible to balance these considerations satisfactorily and, in this regard, welcome the reserve of the Court below in leaving the agency to develop the final form of a procedure that meets this dual requirement. We are encouraged by the existence of successful models for informal due process hearings in other areas, e.g., the hearings provided public school students in New York City prior to suspension. A successful and tested solution promises application in other social welfare fields and other jurisdictions. For example, if a satisfactory, informal review

procedure could be developed, it could be used to replace the fully adversarial Section 392 reviews.

In light of the difficulties presented, we hope that the lower Court will retain oversight and, in particular, will review a plan developed by the administrative agency to test these considerations before finding satisfactory compliance.

CONCLUSION

It is respectfully requested that this Court:

- a) reverse the opinion of the Court below insofar as it requires a review of agency decisions to return home children who have been voluntarily placed in foster care, and
- b) affirm the remainder of the opinion acknowledging the right of children in foster care to prior due process review of agency decisions to remove them from one foster placement to another.

Respectfully submitted,

JEAN MURPHY
ADRIANE G. BERG
of Counsel
Dated: New York, N.Y.
December 14, 1976

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In the

Supreme Court of the United States

Nos. 76-180, 76-183
76-5193, 76-5200

JAMES DUMPSON, individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION: ELIZABETH BEINE, individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN: ADOLIN DALL, individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE: and JAMES P. O'NEILL, individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK: BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LEVINE, individually and as Commissioner of the New York State Department of Social Services, and JOSEPH D'ELIA, individually and as Commissioner of the Nassau County Department of Social Services,

Appellants-Defendants,

NAOMI RODRIGUEZ, ROSA DIAZ, MARY ROBINS, DOROTHY NELSON SHABAZZ, and LILLIAN COLLAZO, on behalf of themselves and all other similarly situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY, RAFAEL SERRANO, and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

Approval by Parties to File Amicus Brief

DUMPSON

v.

ORGANIZATION OF FOSTER FAMILIES
FOR EQUALITY AND REFORM

Docket No.

76-183

All parties to this action, listed below, hereby
consent to the filing in the Supreme Court of the United
States a brief by Community Service Society, 105 East
22 Street, New York, New York 10010 as an amicus curiae.

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Dated: 11/17/76 Leonard Koerner

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SEE LETTER ATTACHED

Dated: _____

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Dated: 11/17/76 Louise Gans

RALPH G. CASO
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November 18, 1976

Community Service Society
105 E. 22nd Street
New York, N.Y.

Attn: William Haley, Esq.

Re: OFFER v. Dumpston

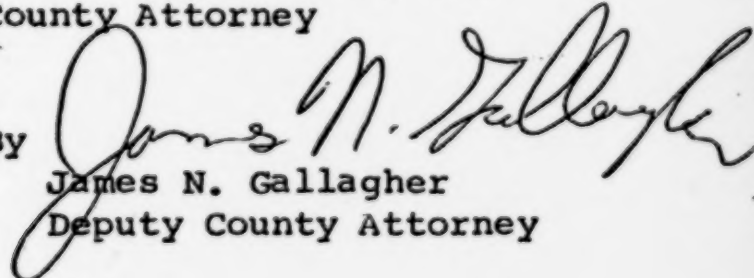
Dear Sir:

The defendant, County of Nassau, in the above matter hereby consents to your filing an amicus curiae brief in said action which is presently pending before the Supreme Court of the United States and has the docket number of 76-183.

Very truly yours,

JAMES M. CATTERSON, JR.
County Attorney

By


James N. Gallagher
Deputy County Attorney

JNG:pm

IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 76-180; 76-183; 76-5193 and 76-5200

JAMES DUMPSON, Individually and as Administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; ELIZABETH BEINE, Individually and as Director of the NEW YORK CITY BUREAU OF CHILD WELFARE, and as Acting Assistant Administrator of NEW YORK CITY SPECIAL SERVICES FOR CHILDREN; ADOLIN DALL, Individually and as Director of the DIVISION OF INTER-AGENCY RELATIONSHIPS of the BUREAU OF CHILD WELFARE; and JAMES P. O'NEILL, Individually and as Executive Director of CATHOLIC GUARDIAN SOCIETY OF NEW YORK; BERNARD SHAPIRO, Individually and as Executive Director of the NEW YORK STATE BOARD OF SOCIAL WELFARE; ABE LAVINE, Individually and as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES; and JOSEPH D'ELIA, Individually and as Commissioner of the NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

Appellants-Defendants,

NAOMI RODRIGUEZ; ROSA DIAZ; MARY ROBINS; DOROTHY NELSON SHABAZZ; and LILLIAN COLLAZO; on Behalf of Themselves and All Others Similarly Situated,

Appellants-Intervenors,

DANIELLE and ERIC GANDY; RAFAEL SERRANO; and CHERYL, PATRICIA, CYNTHIA and CATHLEEN WALLACE, on Behalf of Themselves and All Others Similarly Situated,

Appellants-Plaintiffs,

Against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM; MADELINE SMITH; RALPH and CHRISTIANE GOLDBERG; and GEORGE and DOROTHY LHOTAN, on Behalf of Themselves and All Others Similarly Situated,

Appellees.

Appeal from the Judgment of the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF

**STATEMENT OF INTEREST OF
AMICUS CURIAE**

The National Juvenile Law Center, a project of St. Louis University School of Law, is a national legal services support center, funded by contract with the Legal Services Corporation.

The function of the Center is to provide assistance to clients eligible under the guidelines established by the Legal Services Corporation Act of 1974 in the area of juvenile and family law. The attorneys employed by the Center also act from time to time as *amicus curiae* in cases involving issues of substantial public interest and importance which affect the rights of indigent children and their parents.

The National Juvenile Law Center takes an interest in this case because of the importance to both the poor child and his parent of the procedures surrounding the foster care system. In addition, *amicus* believes that the issues before this Court are substantial, critically affecting both the public interest in providing good substitute care for children removed from their natural homes and the child's interest in receiving the best care possible.

Counsel for *amicus* are familiar with the questions involved in this case and believe that it is essential that an additional argument, advocating neither of the polar positions presented by the parties, be brought to the attention of this Court.

Amicus has requested and obtained the written consent of all parties to file this brief.

SUMMARY OF THE ARGUMENT

It has long been recognized that parents and children have constitutionally protected rights and interests. This Court has consistently recognized and protected parental rights to the care, custody and control of their children, and the right to familial privacy. While the rights and interests of children have not often been before this Court, when presented, the constitutional claims of children have been recognized. Having established that both parents and children have protected interests, it becomes necessary to define the nature of the process mandated

to protect those interests. This determination must be made after examining the particular context in which the claim is raised.

New York has created a statutory system for the identification and protection of neglected children. One phase of this system involves the use of foster care placement for children judicially declared neglected or voluntarily placed with the agency by parents. A decision of a state agency to terminate foster care placement and return the child to the natural parents is made according to statutory procedures, which are adequate and comport with due process concepts in those situations in which the decision is made.

However, the statutory procedure is deficient and fails to protect the parties' interests when the decision is one to transfer a child from one foster home to another.

INTRODUCTION

Amicus hopes in this brief introduction to acquaint this Court with some of the principle characteristics of the foster care system. It is a system which has existed much like an arm of the juvenile courts providing the care which juvenile statutes mandate without itself receiving significant statutory or judicial recognition. The system operates by contracting with a natural parent to provide care for his child and then contracting with a foster parent for the provision of those services. Any change in the existing relationship affects the interests of all of the parties.

This suit was originally filed on behalf of foster parents and foster children who asserted an interest in being afforded a hearing prior to the child's removal from his foster home. The district court in this case rejected the foster parents' expectation

of continued care of the foster child and declined to rule on their entitlement to assert the constitutional protections afforded the traditional biological family. *Organization of Foster Families, etc. v. Dumpson*, 418 F. Supp. 277, 280-281 (S.D.N.Y. 1976). Since that holding of the court has not been appealed, *amicus* has omitted any significant discussion of the rights and interests of the foster parents. This is not to imply that such rights have not been recognized by courts and legislatures but only to indicate that they are not currently before this Court.

Although foster care dates back to ancient times and has long been a part of Anglo-Saxon, Welsh and Irish culture, the practice today in America differs significantly from the early foster care concepts. Foster care in this country was developed in response to evils such as infant mortality, intellectual retardation, and sociological and psychological maladjustment that existed in large child care institutions. Over the years the number of children in foster care has increased steadily and early estimates indicated that by 1975 4.7 children out of every 1000 would be participating in this form of substitute parental care. S. Low, *Foster Care of Children—Major National Trends and Prospects*, U.S. Department of Health Education and Welfare 1-2 (1966).

A child may enter the foster care system either involuntarily following an adjudication of neglect by a court, or voluntarily subsequent to the parent executing an entrustment agreement with an agency. This latter practice has currently come under sharp attack because it allows a social worker to substitute his judgment for that of an impartial hearing officer. See Levine, *Caveat Parens: A Demystification of the Child Protective System*, 35 U. Pitt. L. Rev. 1, 23-29 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1006-1007 (1975); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights under the Due Process Clause*, 4 Suffolk L. Rev. 631, 645-664 (1970).

Despite the apparent inequity of allowing a social worker to make crucial decisions regarding a child's family environment, estimates indicate that as many as half of the children in foster care are there under voluntary agreements. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. J. 887, 921-22 (1975); Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Educ. Rev. 600, 601 (1973). One commentator goes so far as to place the number at 90% for the state of Pennsylvania. Levine, *supra* at 29.

The foster care system is designed to provide temporary placement for the child who is not receiving adequate care from his biological parents. The theoretical goals of the foster program have been expressed by the Child Welfare League of America in its *Standards for Foster Care Service* (1959):

The ultimate objectives of foster care should be the promotion of healthy personality development of the child, and amelioration of problems which are personally or socially destructive.

Foster family care is one of society's ways of assuring the well-being of children who would otherwise lack adequate parental care . . .

Foster family care should provide, for the child whose own parents cannot do so, experiences and conditions which promote normal maturation (*care*), which prevent further injury to the child (*protection*), and which correct specific problems that interfere with healthy personality development (*treatment*). Foster family care should be designed in such a way as:

to maintain and enhance parental functioning to the fullest extent;

to provide the type of care and services best suited to each child's needs;

to minimize and counteract hazards to the child's emotional health inherent in separation from his own family and the conditions leading to it;

to make possible continuity of relationship by preventing replacements;

to facilitate the child's becoming part of the foster family, school, peer group and larger community;

to protect the child from harmful experiences;

to bring about his ultimate return to his natural family whenever desirable and feasible.

Id. at 6-7.

To implement these goals, foster care services must develop procedures and practices to govern internal operation. The agency's procedures relating to the transfer of children either from one foster home to another or from a foster home back to the child's natural parents are the subject of this litigation.

ARGUMENT

I

Parents and Children Have Fundamental Rights and Interests Protected by the Due Process Clause of the Fourteenth Amendment in the Preservation and Restoration of the Family Unit and in the Welfare of Its Members.

A. Fundamental rights and interests are protected by the Due Process Clause.

Whether or not due process is required in a particular context depends upon the existence of a right or interest that is entitled to protection. While the Constitution states that no person shall be deprived of life, liberty, or property without due process, this Court has recognized that there exist a variety of interests that are "difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 710 (1976). Among these are the rights of individuals in matters relating to family life and child rearing. *Stanley v. Illinois*, 405 U.S. 645 (1972).

In addition to protecting rights that stem from the Constitution, due process also protects those rights and interests that are created and defined by statute or rule. *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The rights and interests of both the parents and the children involved in the case before this Court are not only fundamental within the meaning of the due process clause, but are also recognized by the State of New York.

B. Parents have a fundamental right to the care, custody and control of their children.

The scope of parental rights is nowhere exhaustively defined; however, it is frequently recognized as including the right to the care, custody and control of the child, the right to discipline the child, and the right to control his religious and moral education. These rights are not to be disturbed by the state so long as the parent discharges certain obligations to provide for the child's support, maintain his health, and ensure his education and welfare.

The Constitution has been interpreted to prevent state interference in family life in a number of contexts. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court defined the "liberty" protected by the fifth and fourteenth amendments to include the right to marry, establish a home and bring up children, and therefore concluded that a statute forbidding the teaching of the German language infringed upon the parental right to choose an education for one's child.

The Supreme Court of the United States has frequently emphasized the importance of the parents' right to the companionship, care, custody and management of their children. This right has been deemed "essential," *Meyer v. Nebraska*, 262 U.S. at 399, recognized as one of the "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and deemed "far more precious . . . than property rights", *May v. Anderson*, 345 U.S. 528, 533 (1953). In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court stated:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Id. at 166.

Most recently this Court invalidated mandatory leave provisions for pregnant school teachers because these provisions unnecessarily interfered with the decision to raise a family. This Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 639-40 (1974). See *Wisconsin v. Yoder* 406 U.S. 205 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The basic integrity of the family unit is protected not only by the due process clause of the fourteenth amendment to the United States Constitution, *Meyer v. Nebraska*, 262 U.S. at 399, but also by the equal protection clause of the fourteenth amendment, *Skinner v. Oklahoma*, 316 U.S. at 541, and the ninth amendment, *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court discussed the relevance of many of these cases to the abortion question. This Court noted that while privacy is not explicitly mentioned in the Constitution, a right to a "guarantee of certain areas or zones" of privacy has been constitutionally recognized to include those rights that are "implicit in the concept of ordered liberty," such as "activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education." *Id.* at 152-153. (Citations omitted). Although basing its decision on a right to privacy, this Court also stated its belief that the privacy right is "founded in the Fourteenth Amendment's concept of personal liberty." *Id.* at 153.

The importance of these fundamental rights and the constitutional protections afforded them was summarized in *Stanley v. Illinois*, 405 U.S. 645 (1972), when the Court stated:

It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." [Citations omitted].

* * * * *

The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted].

Id. at 651.

State courts, also recognizing the primacy of the parents' right to control their children, have found these rights protected by the due process clause of the fifth and fourteenth amendments. Due process has been interpreted to include the right to a free transcript and counsel for an appeal of a termination order, *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); the waiver of filing fees and the provision of a free transcript for an indigent in a dependency appeal, *Appeal in Pima County Juvenile Action No. J-46735 v. Howard*, 112 Ariz. 170, 540 P.2d 642 (1975); the right to court appointed counsel at a dependency hearing, *In re Welfare of Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975); the right to counsel at removal hearings, *Danforth v. State Department of Health and Welfare*, 303 A.2d 794 (Me. 1973); and the right to counsel for indigents in neglect hearings, *In re Ella B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972).

This constitutional basis for parental rights is reinforced by the traditional notion that a child's parents will love it most and care for it best. *Moody v. Moody*, 211 So.2d 842 (Miss. 1968). Many state courts in neglect and dependency hearings have expressed this preference for placement of children with their natural parents, *In re Raya*, 255 Cal. App. 2d 260, 63 Cal.

Rptr. 252 (1967); *In re Hudson*, 13 Wash.2d 673, 126 P.2d 765 (1942). This preference has also been recognized in custody disputes, *Turner v. Pannick*, 540 P.2d 1051 (Alas. 1975); *Reynardus v. Garcia*, 437 S.W.2d 740 (Ky. 1968); and in adoption proceedings, *In re Adoption of Farabelli*, — Pa. —, 333 A.2d 846 (1975); *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953).

It is clear beyond doubt that the rights and interests that a parent has in the care, custody and control of his children are fundamental, stemming as they do from the fifth, ninth and fourteenth amendments. Because of the fundamental nature of the rights involved, due process protections of the fourteenth amendment must be afforded parents before their rights may be abridged.

C. Children have a highly protected interest in adequate physical, mental and emotional development.

Prior to the landmark decision of *In re Gault*, 387 U.S. 1 (1967), it was commonly accepted that children had no rights—only duties:

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.

Id. at 17. The Court pointed out the potential for abuse inherent in this right-to-custody approach, however benevolently motivated, and stated that "neither the Fourteenth Amendment

nor the Bill of Rights is for adults alone." *Id.* at 13. While *Gault* is indisputably the most important decision to date adjudicating the rights of juveniles, the Supreme Court specifically cautioned that it was not considering the impact of the Constitution on the entire delinquency process. It was left to later cases to more fully develop the boundaries of the constitutional protections afforded minors in delinquency cases. *In re Winship*, 397 U.S. 358 (1970), held that proof of guilt must be shown beyond a reasonable doubt in delinquency hearings; but fundamental fairness does not mandate the provision of jury trials for juveniles. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The double jeopardy protection was extended to juveniles in *Breed v. Jones*, 421 U.S. 519 (1975).

This Court has considered the rights of children outside the delinquency context in a number of school cases. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the first amendment was held to safeguard the right of minor students to wear armbands as a means of political protest. Avoiding an extended discussion of the point at which a minor's interests are protected, the court stated simply:

Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

393 U.S. at 511.

The Court has also afforded children due process rights in the school setting. *Goss v. Lopez*, 419 U.S. 565 (1975). The state-created statutory right to a free education was held to ripen into both a liberty and property interest under the due process clause of the fourteenth amendment. As a consequence students could not be suspended from public schools without notice of the charges and an opportunity for a hearing.

The opinions of this Court in these school cases do not address the differences between rights accorded juveniles and adults. Mr. Justice Stewart, in his concurring opinion in *Tinker*, expressed some dismay at this omission, since the Court had just reiterated the principle that states possess broader regulatory authority over children than adults in *Ginsberg v. New York*, 390 U.S. 629 (1968).

Most recently this issue was given particular attention in *Planned Parenthood of Central Missouri v. Danforth*, — U.S. —, 96 S.Ct. 2831 (1976). This case presented the constitutionality of a statute requiring the consent of a parent before an abortion may be performed on an unmarried woman under eighteen years of age. The Court, citing many of the children's cases already mentioned, first recognized the constitutional basis for the right being asserted:

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

96 S.Ct. at 2843. The Court then balanced the state's interests in requiring parental consent against a minor's right of privacy:

Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

Id. at 2844. The words "mature minor" place a clear limitation on the holding which is made explicit in a later paragraph:

We emphasize that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.

Id.

From a reading of these decisions it is clear beyond a doubt that children do possess constitutionally protected interests and rights. At times the rights of the parent may overshadow these interests, but such conclusions can be reached only after an examination of the importance of the right or interest in question.

In addition to the number of Supreme Court cases deciding children's issues, lower federal courts and many state courts have contributed significantly to the expansion of children's rights. *Shone v. State of Maine*, 406 F.2d 844 (1st Cir. 1969), held that transfer of a juvenile from a training center for delinquent youth to an adult correctional facility, without provision of the procedural safeguards afforded minors committed directly to the adult institution, violated due process and equal protection of the law. In *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (R.I. 1972), the court employed the same constitutional basis in enjoining the incarceration of juveniles in one particularly anti-rehabilitative wing of the delinquency facility. The opinion additionally prohibited the use of the solitary confinement rooms as a violation of the eighth amendment's ban against cruel and unusual punishment. Due process was also found to attach at the preliminary detention stage in *Doe v. State*, 487 P.2d 47 (Alas. 1971). The case went on to require that detention be based on sworn testimony, and that the order contain a statement of the facts on which it was based. The right to be present at the disposition stage of a Person in Need of Supervision proceeding was found to be protected by the due process clause in *In re Cecilia R.*, 36 N.Y. 2d 317, 367 N.Y.S.2d 770, 327 N.E.2d 812 (1975).

It is not surprising that state courts have begun to evidence concern for the rights and interests of minors since they have long taken an interest in their welfare. Traditionally the state served as an arbiter in custody disputes between parents, considering the "best interests of the child" in making its decision. More recently courts have recognized that minor children in

divorce proceedings may have interests independent of the parent in the outcome of the litigation. To fill this gap, courts and legislatures have acted to provide for the appointment of an attorney or guardian *ad litem* to represent the interests of the child. *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974). See *Zinni v. Zinni*, 103 R.I. 417, 238 A.2d 373 (1968); *Wendland v. Wendland*, 29 Wisc.2d 145, 138 N.W.2d 185 (1965). Not to recognize their rights and interests would be to treat children as chattels, to be divided between the divorced parties like a pair of shoes.

Commentators have uniformly rejected this view and have consistently argued for increased representation in all proceedings effecting the eventual placement of minors. Comment, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 Hastings L. J. 917 (1976); Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973); Inker and Perretta, *A Child's Right to Counsel in Custody Cases*, 5 Fam. L. Q. 108 (1971); Klienfield, *The Balance of Power Among Infants, Their Parents and the State*, 4 Fam. L. Q. 320 (1970).

Neglect and termination statutes currently evidence a primary concern for protecting the interests of children. New York's statute enumerates the safeguarding of their physical, emotional and mental well being, and the establishment of procedures to protect them from injury or mistreatment as two of its major goals. N.Y. Fam. Ct. Act § 1011 (McKinney 1975).

New York is not alone in its statutory assertion of the child protective interest. Practically every state has a purpose clause similar to the New York statute. See Katz, Howe, and McGrath, *Child Neglect Laws in America*, 9 Fam. L. Q. 1 (1975), for a survey of child neglect laws. In addition, every state has made provision for reporting of child abuse. See, e.g., Paulsen, *The Legal Framework for Child Protection*, 66 Cal. L. Rev. 679

(1966). Finally, welfare statutes and regulations and mandatory school attendance laws are other expressions of the child protective interests by the states.

There can be no doubt that today the rights and interests of children are being recognized at an ever increasing rate. Some judges and commentators have gone so far as to develop a compendium of rights to be afforded children. See, e.g., *O'Shea v. Brennan*, — App. Div.2d —, 387 N.Y.S.2d 212 (1976); Foster and Freed, *A Bill of Rights for Children*, 6 Fam. L. Q. 343 (1972).

Although this Court has made no definitive pronouncement acknowledging a child's right to the preservation and maintenance of an adequate family unit as stemming from the Constitution, it has most certainly implied it. Recognizing that a parent's rights are fundamental, this Court has concluded that the "integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . , The Equal Protection Clause of the Fourteenth Amendment . . . , and the Ninth Amendment." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted). This integrity is as much an interest and right of the child as it is of his parent. He suffers a loss as grievous as that suffered by his parent when that unit is dissolved or altered. For these reasons, his interests must also be protected by the due process clause.

However, whether or not this Court views a child's interest in family integrity as stemming from the Constitution, that interest must ultimately be entitled to due process protection. New York's ever increasing recognition, both by the legislature and by the courts, of the rights of a child to a healthy and stable home environment mandates this conclusion. Insofar as the state has created these rights, it cannot subsequently interfere with them without providing due process safeguards.

II

Procedures Necessary to Assure Due Process Will Vary in Accordance With the Rights and Interests to Be Protected.

A. A determination of what process is due requires a three factor analysis.

Having established in Part I that both parents and children have rights and interests protected by the due process clause, it becomes necessary to define the nature of the process mandated to protect those rights, recognizing that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

This Court recently articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), specific guidelines for identifying required due process:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

Analyzing earlier decisions in light of these factors leads to several conclusions. First, the more fundamental the right or interest threatened, the greater the probability that due process will require a hearing prior to a deprivation. In *Goldberg v.*

Kelly, 397 U.S. 254 (1970), for example, this Court required a hearing prior to the termination of welfare benefits because of the possibility that an eligible recipient might be deprived of the means to live without due process. On the other hand, the temporary deprivation of disability benefits, not awarded on the basis of financial need, was considered a less serious loss and one not warranting a hearing prior to the deprivation. *Mathews v. Eldridge*, 424 U.S. at 349.

Second, if an erroneous deprivation may be both long in duration and result in serious consequences, then a hearing may be required prior to the deprivation. *Id.* at 342.

Third, if the existing administrative procedures are unreliable or unfair, additional procedural safeguards should be implemented. The following are to be considered in making this assessment: whether the necessary inquiry involves investigation and analysis of highly subjective information; whether the information is available from reliable sources; and whether there is a substantial risk of error in the truth finding process as it exists. *Id.* at 343-347. Where, as in *Mathews*, existing procedures are deemed sufficient to guard an important right, due process will not require the initiation of additional procedures.

Fourth, the more basic the interest involved, the more complex the required hearing will be. For example, a welfare recipient, faced with a possible loss of livelihood, was entitled to:

timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. at 267-268. That a less serious deprivation results in fewer due process protections is illustrated in *Goss v. Lopez*, 419 U.S. 565 (1975). There a relatively brief interference with the right to an education, suspen-

sion of ten days or less, was held to require that a student be given "oral or written notice of the charges and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581.

Finally, protecting financial and administrative concerns is generally considered less important than providing adequate protection of fundamental rights. Where consideration of both interests conflicts, the latter will generally prevail. If, however, the state's legitimate interests are, on a comparative basis, as important as those asserted by an individual or group, the process required to protect those interests may be minimal. See, e.g., *Goss v. Lopez*, 419 U.S. at 581, in which a student's right to an education was balanced against the school system's interest in maintaining discipline coupled with the possibility of an overwhelming administrative burden.

A conflict in rights and interests of the parties to this litigation may arise when any of three situations is contemplated: a return to the natural home of a child placed voluntarily in foster care; a return to the natural home of a child placed under court order; or a placement in a different foster home of a child placed voluntarily or involuntarily. Only after a thorough consideration of the rights and interests of the natural parents, the children and the state can an accurate assessment of the procedures mandated by due process be made.

B. Current New York procedures for a return to the natural home of a child placed voluntarily in foster care comport with due process.

The state may decide at any time to return a voluntarily placed child to his natural parents. Such placements are made by mutual agreement between the parents and the agency for the purpose of providing care for the child during a period when the parent is unable to fulfill his duties. When both par-

ties agree that the parent is once again ready to assume these obligations towards the placed child, the reason for state involvement ceases and the parties should be returned to their former positions. This occurrence has no prejudicial effect on a parent but rather serves to fulfill his right to the care, custody and control of the child. Unfortunately the same cannot be said for the child, since his interests may or may not be served by such a move. While the child's interest remains in receiving adequate care, there is no guarantee that the return to the natural home will serve this purpose.

Functioning between this clash of two possibly competing interests one sees the interests of the state exercised through the case worker's actions. It is the decision of the social worker, based on training, experience and knowledge of the situation, which prompts the movement of the child. If the risk of an erroneous determination by the caseworker is slight there is a reduced interest in providing due process protections.

There are a number of factors which lead one to believe that an agency approved reunification of a family will only occur after there is ample evidence that the parent can adequately meet the child's need for care. Since social workers are often white, middle-class and unmarried or childless, the values of the worker and his clients may diverge sharply. Values learned by middle class America simply have no application where the pressure is for survival. This can result in the case worker setting goals and expectations which the parent not only sees as hopeless but often unrealistic. Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 13-19 (1973). Thus the period of separation of a child from his parents may be prolonged until the parents' values measure up to those of the social worker.

In many instances a financial disincentive to terminate foster care may exist. Michael Wald in his article, *State Intervention*

on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 679 (1976), describes the situation in New York City where the agency is compensated substantially while the child is in foster care. If the child is removed from this form of care, however, payments cease although the agency must continue to provide services.

The typically large caseloads and high rates of turnover among social agency personnel may delay any attempt at reunification of the family since it usually takes more time to return a child to his home than to retain him in foster care. Each new caseworker must familiarize himself with the child and his family before making any decision and this can take much time.

Although the foster parent's interests are not before this Court, they may likewise exercise a force for insuring a proper review of the situation. The foster parents may request a conference with the agency before the removal occurs, or instead employ a post-removal fair hearing and later judicial review. 18 N.Y.C.R.R. 450.10 (formerly 450.14).

Since all four of these factors militate heavily against a decision to return the child to his parent, when the return is finally authorized it seems certain that the state has given every possible consideration to the interests of the child in receiving adequate care.

The likelihood of additional proceedings adding anything valuable to the decision-making process is slight. Since the credibility of a particular interested party is not usually the basis for the determination, the necessity for adversarial procedures is lessened. Instead, the routine documentation prepared by the case worker is relied upon to support the decision to return the child.

Having considered the interests of both child and parent one must now consider the state's interest in these decisions. While the state may act to provide care for the child and to strengthen the family unit, the relevant concern in this context is the preservation of scarce state resources. It seems clear that the imposition of additional procedures prior to returning a child would add little to this situation and place weighty burdens on over-worked staff and under-financed agencies.

Because of the substantial agency interests in continued foster care *Amicus* believes that the decision to move a child from foster care to his parent's home is based upon a thorough and penetrating investigation of the adequacy of the natural home and thus current New York practices comport with due process requirements.

C. Current New York procedures for a return to the natural home of a child placed under court order comport with due process.

Interests of these parties are also brought into conflict when a child placed with an agency subsequent to a court adjudication of neglect is to be removed from foster care and returned to his natural parents. The major factor that distinguishes this situation from the previous situation is the fact that the court has determined that the child should be removed from his parents because they were deficient in properly providing for him.

In this situation, however, the child's interest in obtaining adequate care should be more closely scrutinized since in the past an impartial judge had found that interest sufficiently imperiled to justify the child's removal from his natural home. Consequently, the child is not merely asserting a general right to care but rather an interest in protection from a harm which previously justified his removal from the home.

The parent's interest in his child's care, custody and control is not reduced because there has been a prior adjudication of neglect. However, the presumption that the parent is best able to care for the child has been rebutted by the court's adjudication. While the parent's interest in a quick return of the child remains viable, it is overshadowed by the child's interest in continued protection.

Procedures currently in existence adequately safeguard the interests of both parent and child by requiring that the committing court or non-agency official consent to the return of the child. N.Y. Soc. Serv. Law § 383(1) (McKinneys 1966). The official who previously found the child in need of substitute care is in a unique position to give proper consideration to the heightened interests of the child.

Current procedures also require that prior to agency initiation of the return of a child to his natural parents, both the agency and the committing authority must agree that such action will be in the best interests of the child. Adding another hearing would serve little purpose in protecting the child and might in fact be detrimental to both parent and child by delaying their ultimate reunion.

An additional hearing, from the state's point of view, would do little to improve the "correctness" of the decision and would significantly increase administrative burdens. When the probable value of the additional safeguards offers little to offset the disadvantages they entail, additional due process protections will not be mandated.

D. Due process requires that biological parents and foster children be afforded an opportunity for hearing prior to a transfer of the child from one foster home to another.

A child may enter the foster care system either through a voluntary agreement executed by his parent or by court order,

made subsequent to an adjudication of neglect or dependency. In either case the child will be placed in a foster home subject to removal to a different placement at the whim of the agency.

Significant rights and interests of both parent and child are also affected when an agency makes a decision to transfer a child from one foster home to another. Although these interests are similar to ones involved in the two situations already discussed, some additional considerations must be evaluated.

Unless the natural parent's right to the care, custody and control of his child has been terminated by court order, the parent retains an important interest in the restoration of family integrity. This interest may be adversely affected by the agency decision either to extend the existing foster placement or to effectuate a transfer to another foster home. The physical proximity of the natural parent to his child may play an important role in maintaining the bonds of affection between the two. The continuing existence of this bond may be the basis for a return of custody to the parent. Even when this is not the result, the existence of the bond may be the one factor that prevents an effort to terminate parental rights from being successful.

Additionally, the placement decision may adversely affect a parent's fundamental interest in the care, custody and control of the child because of the character of the foster parent who assumes custodial responsibility for the child. The foster parent, in pursuit of his own ends, may make visitation difficult for the natural parent, may attempt to adversely influence the child's attitudes toward the natural parent, and may actively initiate steps to gain legal custody of the child.

As the duration of a placement with a foster family lengthens, the ultimate goal of returning the child to the natural parent is threatened. The longer the period a child spends with one

Foster family, the smaller the likelihood that an agency will authorize return of the child to the natural parent.

Thus, the right of a parent to the care, custody and control of his child is almost certain to be adversely affected when an agency resolves the question of whether to make a change in foster care placement.

Whether a child enters the foster care system voluntarily or under court commitment, he has a significant interest in securing care adequate to insure his physical, mental and emotional well-being. When the agency decides to exercise its discretion by moving the child from one placement to another it must determine that the child's right to adequate care will be fulfilled in the second foster home. The duty of the agency is partially met by requiring that the foster parents and their home have complied with all state licensing regulations. In addition, an individual study should be made to guarantee that the care provided by the placement is adequate for the needs of the child.

When the parent maintains a strong bond with the child and works to reestablish a suitable home situation for him, the foster care arrangement should be structured as an interim home, maximizing parental involvement with the child. The interests of both parent and child are served by efforts to assist the parents in preparing for a return of their child.

Conversely, in instances where foster care has become a long term placement with minimal or non-existent natural parent contact, the child's interest in securing adequate care is best served by the least disruptive placements. The nature of the care provided by state child care agencies has recently come under attack as failing to meet the child's need for emotional stability. Levine, *Caveat Parens: A Demystification of the Child Protective System*, 35 U. Pitt. L. Rev. 1, 19-22 (1973); Wald, *State Intervention on Behalf of "Neglected" Children: Stand-*

ards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 643-648 and 667-676 (1976).

Vincent DeFrances, Executive Director of the Children's Division of the American Humane Association warns us of the dangers of modern foster care systems:

For a few victims of neglect, replacement away from home may be the first step towards life in a new, permanent, and rewarding setting. For many children, however, it becomes a prelude to a series of displacements from foster home to foster home, with each new dislocation leaving another scare on an already damaged personality. DeFrancis, *Child Protective Services—A Community Process* (1964).

Writers in the area of child welfare are unanimous in their assertions that continuity in relationships, surroundings and environment is essential to the child's normal development. See Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, 31-39 (1973).

When a social services official proposes to transfer a child from one foster care placement to another he is required, under existing procedures, to notify the foster parent of his intent. Upon receipt of that notice the foster parent may request a conference at which he may submit reasons why the child should not be removed from his custody. 18 N.Y.C.R.R. § 450.10.

Additionally, agency regulations entitle the foster parent to have the proposed action reviewed at this conference. Significantly, neither the child nor the natural parent is notified of or represented in this procedure, despite their important individual interests in the decision of the agency.

Unlike the situation discussed in Parts IIB and IIC of this brief, the transfer of a child between foster families involves no systematic checks that would, even inadvertently, protect the interests of either the child or the natural parent in transfers from one foster home to another.

Damage to the interests of children and their parents would be minimized if the agency official initiating the transfer were required to justify his action by showing that the transfer would 1) enhance the quality of care provided the child; 2) contribute to the long range development of the child's physical, mental, and emotional well-being, and 3) further the eventual return of the child to the natural parent consistent with the progress of the parent in his efforts to reestablish the home.

To assure that these considerations are addressed, due process requires that the rights and interests of the parent and the child be given, at a minimum, the same protections afforded a foster parent. These would include written notice by the social services official of the intention to remove a child from his foster family at least ten days prior to the proposed removal date, the right upon request to a conference with the social services official at which the parent and child can appear with a representative to review the proposed action, be informed of the reasons for the change, and be allowed to espouse a position different from the agency position. Notice of the conference must be given at least five days before it is to occur, written notice of the decision is required within five days after the conference, and finally, the decision may be appealed to the social services department. 18 N.Y.C.R.R. § 450.10. An important additional requirement should be the appointment of counsel for a child who is too young to recognize and articulate his interests.

Since this procedural framework already exists for the benefit of foster parents, an extension of these protections to children and their parents would entail minimal new burdens on the state.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to reverse the judgment of the district court and order entry of judgment consistent with the foregoing analysis.

Respectfully submitted,

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Certificate of Service

I, Michael A. Wolff, Counsel for Amicus Curiae, do hereby certify that I have served by United States Mail, postage prepaid, first class, on this date, November 26, 1976, three copies of Brief of Amicus Curiae to the following persons: Leonard Koerner, Assistant Corporation Counsel of the City of New York, Counsel for New York City Appellants, at Municipal Building, New York, New York 10007; Mark C. Rutzick, Assistant Attorney General, Counsel for Appellants Shapiro and Lavine, at Two World Trade Center, New York, New York 10047; Louise Gruner Gans, Community Action for Legal Services, Inc., Counsel for Appellants Rodriquez, Robins, Shabazz, and Collazo, at 335 Broadway, New York, New York 10013; Helen L. Bittenwieser, Counsel for Appellants-Plaintiffs Danielle and Eric Gandy, Rafael Serrano, and Cheryl, Patricia,

Cynthia and Cathleen Wallace, at 575 Madison Avenue, New York, New York 10022; and Marcia Robinson Lowry, Children's Rights Project, New York Civil Liberties Union, Counsel for Appellees, at 84 Fifth Avenue, New York, New York 10011. I further certify that all parties required to be served in this appeal have been served.

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DEC 17 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

Nos. 76—180
76—183
76—5193
76—5200

J. HENRY SMITH, *et al.*,
Appellants-Defendants,
against

ORGANIZATION OF FOSTER FAMILIES FOR
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Appellees-Plaintiffs.

APPEAL FROM THE JUDGMENT AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

**Brief for The Legal Aid Society of the City of New
York, Juvenile Rights Division as *Amicus Curiae*.**

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York, Juvenile Rights Division as *Amicus Curiae*.**

Interest of *Amicus Curiae*

The Legal Aid Society is a private, non-profit legal assistance agency which, since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Society has a full-time staff in excess of 600 attorneys who provide assistance to more than 200,000

people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus Curiae, the Juvenile Rights Division of the Legal Aid Society has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile proceedings. The Division presently is comprised of 76 trial, appellate and special litigation attorneys and a social services support staff of 36, including 14 persons with masters degrees in social work, whose primary responsibility is the representation of juveniles who are the subject of Family Court proceedings in New York City. In 1975, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in 17,439 proceedings. The cases included juvenile delinquency, abuse and neglect, person-in-need-of supervision (PINS), special education, violation of probation, extension, termination or transfer of placement within the child care system, family offense, guardianship, termination of parental rights, custody and foster care review proceedings.

In addition, staff members represent children in a myriad of cases related to but separate from Family Court assignment, and on a daily basis deal with the home life and foster care problems of New York City area children. Charles Schinitzky who has been attorney-in-charge of the Division since 1962, regularly has been asked to testify at local, state and federal legislative and administrative hearings concerning care and protection of children.

Based upon its experience, *Amicus* has consistently maintained that children have a right to live in their natural

homes, that they should be removed from those homes and placed into foster care only as a last resort and that they should then be returned to their homes as soon as possible. *Amicus* therefore has urged the introduction of extensive community services so that wherever possible children remain at home and will not have to enter the costly foster care system.¹

The central issue presented in this case—whether a due process evidentiary hearing should be provided for children who are removed from a foster home—is obviously of great importance to the thousands of youngsters in New York City represented by the Juvenile Rights Division, many of whom are presently in foster care.

Amicus is submitting this brief because of its concern about the impact of this case on its clients. *Amicus*, as the single largest legal representative of children in the United States, wishes to provide this Court with an analysis of the issues from the viewpoint of the foster child which may not otherwise be presented.

Statement of the Case

This class action was brought pursuant to 28 U.S.C. §§ 1343(3) and (4) and 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York on behalf of a class of foster parents individually and as the "next friend" of a class of foster children residing in their homes to declare unconstitutional and enjoin enforcement of New York Social Services Law

¹In 1974, the total expenditures in foster care for New York City children alone were \$252,805,000. [New York State Board of Social Welfare, "Foster Care Needs and Alternatives, p. 47 (1974) ("Bernstein Report.")].

§§ 383(2) and 400 and 18 New York Code Rules and Regulations ("N.Y.C.R.R.") 450.14, which laws govern, *inter alia*, the transfer or removal of children from foster care.

By order dated December 10, 1974, District Court Judge Robert Carter appointed independent counsel to represent the children, ruling that representation of the children by counsel for the foster parents presented a conflict of interest.

By judgment and order entered April 14, 1976, a three-judge court of the United States District Court for the Southern District of New York, one judge dissenting, declared the challenged laws and regulations to be unconstitutional as applied and enjoined defendants-appellants from removing or authorizing the removal of foster children from foster homes in which they have lived continuously for more than one year without notice and a pre-removal hearing at which the child, natural parents and foster parents could present relevant information. The court directed the state and local defendants to formulate suitable procedures for the hearings which would be mandatory, to provide an independent hearing examiner, and to provide the child with an "adult representative" whenever the child's age, sophistication and abilities to communicate his/her true feelings require it. *Offer v. Dumpson*, 418 F. Supp. 277 (S.D.N.Y. 1976).

The judgment and order of the three-judge court was stayed pending application for a further stay to this Court. On May 12, 1976, an interim stay was granted by Mr. Justice Marshall pending further application and order of the Court, which order was granted by the Court on May 24, 1976, pending timely filing of the ap-

peal. Probable jurisdiction was noted by this Court on October 12, 1976. 45 U.S.L.W. 3272-3.

Plaintiffs-Appellees are the Organization of Foster Families For Equality and Reform and Madeline Smith, Ralph and Christine Goldberg, and George and Dorothy Lhotan. Defendants-Appellants are state and local Department of Social Services officials and intervenor-natural parents. Counsel appointed for the plaintiff children filed an answer in the district court and is therefore an appellant herein.

Amicus has received consent from both appellants and appellees to file this Brief.

Introduction and Summary of Argument.

Whenever children are the aggrieved parties in a case, courts are faced with unique and difficult problems. It is rare that the legal rights of children achieve definition through the children's independent assertion of their interests. Rather, various adults who claim to be representing the interests and rights of the children promote the disposition which they believe to be "in the children's best interests" or in accord with the children's legal rights. The instant case presents this Court with a striking example of how the independent interests and rights of children can be obfuscated and lost because of the competing and, perhaps, selfish attempts by adults to legitimize their own subjective judgment as the controlling factor in determining where a child should live.

No adult in this case, either as counsel or party, represented the children as persons who have independent rights and analyzed the issues for the lower court from

the child's point of view.² *Amicus* believes that an objective evaluation of the issues presented from the child's standpoint teaches that a child should receive an automatic administrative hearing before transfer from a particular foster home to another foster care placement, but should not receive such hearing when returning to his/her natural home.

This Court has already recognized that children are independent persons who "are protected by the constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, — U. S. —, 96 S. Ct. 2831, 2843 (1976); *Goss v. Lopez*, 419 U. S. 565 (1975); *In re Gault*, 387 U. S. 1, 13 (1967). *Amicus* submits that a child, as an independent person to whom constitutional protections apply, who is arbitrarily removed by the State from a family home, albeit a foster home, is deprived of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The nature of

²The foster parents in the case believe that their home is better for foster children than the children's natural home and seek to retain custody over children without adopting them even though their natural parents want them returned. The natural parents who have voluntarily placed their children seek return of their children without having outside persons, specifically foster parents, intervene. The child care officials assert that they know what is best for the child and may transfer a child under their custody anywhere without being constitutionally required to provide due process protections. Even the counsel appointed to represent the children by the district court argued that because child care agencies act in the child's "best interests" scrutinizing their decision concerning placement is unnecessary. *Amicus* takes note that the children's counsel, who is a well respected lawyer in the child care area, had represented child care agencies as their counsel for many years before being appointed as the children's counsel in this case. This involvement was the basis for motions on the part of the foster parents to have her relieved as counsel.

the liberty interest—a known and stable home environment—is, perhaps, the most significant variable in securing a child's well being. *Offer v. Dumpson, supra*, at 282-283.

Amicus' experience shows that a transfer of a foster child from a foster home to which attachments have been formed to another foster home or to an institution subjects the child to a "grievous loss" mandating due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 170-172 (1951) (Frankfurter, concurring); *Meachum v. Fano*, — U. S. —, 96 S. Ct. 2532 (1976). In either transfer, the child is thrown into an alien environment in which he/she has no biological or even psychological bonds. This potentially traumatic experience has often resulted in social and psychological damage to *Amicus'* clients.

A child's transfer from his/her foster home to a foster care institution results in a more severe deprivation than a transfer to another foster home. The deplorable conditions to which children have been subjected in institutions have been well-documented. In fact, according to the Bernstein Report, *infra*, at 27, all 3,951 New York City foster children in general institutions were inappropriately placed.

However, a radically different situation is presented when a child is returned to his/her natural home from a foster home. Although a child is not the property of his/her natural parents [cf. *Planned Parenthood of Central Missouri v. Danforth, supra*], this court has firmly supported the integrity of the biological family unit. *Stanley v. Illinois*, 405 U. S. 645, 650-652 (1972); *May v. Anderson*, 345 U. S. 528, 533 (1953); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

"... [T]he future life of the mother and child together is premised upon 'the child's best interests,'" *In re Jewish Child Care Association*, 5 N. Y. 2d 222, 230 (1959); "and the child has a 'right' to be reared by its [biological] parent." *Bennett v. Jeffreys*, — N. Y. 2d — (1976).

Children who are removed from a foster home to return to their natural parents reassume the liberty interest they possess in their natural family relationship. In all but a few cases the "gain" derived from a child's return to the natural parents more than offsets any "loss" resulting from the removal from a foster home.

Unfortunately, because a few children have an attachment with their foster family which outweighs the benefit derived from their return to their natural family, an anomalous situation has been presented to the Court. Can a fair administrative hearing be implemented *for children*, which protects those who seek to remain in a foster home without impinging the rights of those whose interests lie in reestablishing their natural home? *Amicus* thinks not.

An automatic hearing, as required by the lower court order, appears logical in light of a child's inability to assert his right without adult assistance. But subjecting all children to an administrative hearing even before they can return to their natural parents, will have substantial and damaging effects on those whose predominant liberty interest lies in their natural family relationship.

Not only will an administrative hearing delay a child's return, but child care agencies may forego making a decision to return children to their natural parents because of bureaucratic reluctance to hold administrative hearings. Furthermore, children may be "brainwashed," by the foster parents who are paid to care for them, into falsely believing that their natural parents are unconcerned about them.

The description of the child care system contained in this brief illuminates the methods by which an agency or foster parent may delay or prevent the child's return to his/her natural home. Foster care review [Social Services Law §392 (SSL)] and other equitable remedies (Article 78, CPLR) are used by agencies and foster parents to maintain custody over a child. Moreover neglect and abuse proceedings can be instituted under Article 10 of the Family Court Act (FCA). Significantly, the New York child care system is historically biased in favor of placing children out of their homes and retaining them in foster care (Sister Mary Paul, *infra*).

Amicus suggests to the Court that it apply a balancing test in order to resolve the questions raised in these unprecedented circumstances where an automatic administrative hearing will violate constitutional rights of the persons given the hearing.

In balancing all the competing interests involved [*Cafeteria and Restaurant Workers v. McElroy*, 367 U. S. 886, 895 (1961); *Joint Anti-Facist Refugee Committee v. McGrath*, *supra*, at 163], *Amicus* has concluded that the constitutional rights of more children would be impinged than protected through the introduction of a due process evidentiary hearing before their return to their natural family. In effect, an administrative hearing is not due. *Morrissey v. Brewer*, 408 U. S. 471 (1972).

However, *Amicus* emphasizes that it is not suggesting that individual children may not find methods to challenge their removal from a foster home even when they are returning to their natural home either through the courts or otherwise.

Therefore, the determination of the district court that New York Social Services Law §§ 383(2) and 400 are unconstitutional because they do not provide a foster child

with a due process hearing right, at least when applied to his removal from his foster home and transfer to another foster care placement, is correct.

On the other hand, the lower court ruling requiring an automatic administrative hearing for the child prior to return to the natural parent, should be reversed.

Description of New York Child Care System

New York State has established an extensive child welfare system composed of a growing network of foster care services providing residential care for those children determined to be destitute, dependent, abandoned, neglected and/or abused, delinquent or in need of supervision.

Children from New York City are placed in the State's foster care system for a variety of reasons. Almost 80% enter foster placement due to parental problems. These problems, many of which are temporary in nature, range from mental or physical illness to an inability or unwillingness to care for the child.⁸ However, only about 1% of the children in placement have been adjudicated neglected or abused and only 3% are there because of the death of both parents and the absence of any other person to care for them.⁴ Problems attributable to the child, usually emotional or behavioral in nature, amount to about 14% of the placements.⁵

The users of New York's child care system are overwhelmingly poor and from minority groups. Although

⁸Bernstein Report, *supra*, at page 11.

⁴*Id.* pages 10-11.

⁵*Id.* page 10.

the total population of children in foster care from New York City has climbed dramatically over the last 15 years, there has been a major shift in the ethnic composition of that population. In 1960, of the total number of children in foster care 7,660 (41.6%) were White, 7,087 (38.5%) were Black and 3,677 (19.9%) were Hispanic.⁶ As of June 30, 1976, there were 28,451 children in foster care from New York City.⁷ Of those children, 14,671 or 51.6% were Black; 7,247 or 25.5% were Puerto Rican; 4,991 or 17.5% were White and 1,542 or 5.4% were Interracial, Oriental or Other.⁸ A total of 17,420 of these children were in foster homes, while the remaining 11,025 were in other foster care placements, which include group homes and residences, shelters and general institutions.⁹

Of all children from New York City in foster care, over 50% are from female headed families receiving Aid to Dependent Children.¹⁰ According to the 1970 Census, 45.7% of the female headed families with children in New York City in 1969 reported incomes below the poverty level, and about 56% of all children living in female headed families were living in poverty in 1969.¹¹

⁶*Id.*, page 4, Table 1.

⁷It can be projected that about another 20,000 children are in foster care statewide. Temporary State Commission on Welfare, "Barriers to the Freeing of Children for Adoption" (1976).

⁸Child Welfare Information Services, Inc., "Characteristics of Children in Foster Care, New York City Reports," Table No. 2 (June 30, 1976) ("CWIS").

⁹*Id.*, Table No. 9.

¹⁰Foundation for Child Development, *State of the Child: New York City*, page 61, (April, 1976) Library of Congress Catalog Card No. 76-20228. ("State of the Child")

¹¹*Id.* page 15.

Nearly one-half of the children in New York City living in families with income below the poverty level in 1970 were Black and one-third were Puerto Rican. Black children were therefore twice as likely as White children to be living in poverty (32% versus 16%).¹²

Thus, it is predominantly this class of children—children living in poverty and experiencing the “effects of discrimination”—that comprises New York’s foster care population.¹³

Analyzed by age, the foster care population as of June 30, 1976, was composed of 7.8% children 0-2 years old, 10.1% 3-5 years old, 25.1% 6-10 years old, 28.5% 11-14 years old and 28.6% 15 years and older.¹⁴ Of the children in foster homes, 7% were 0-2 years; 18% were 3-5 years; 25% were 6-9 years; 24% were 10-13 years; 19% were 14-17 years; and 6% were 18-21.¹⁵

Moreover, it has been found that the longer a child remains in foster care, the less likely he/she is to leave, and the length of time a child remains in foster care directly correlates with his ethnic identity, i. e., White children

¹²*Id.*, Table No. 9.

¹³*Id.*, Table No. 4.

¹⁴CWIS, *supra*, at Table No. 18.

¹²*Id.* page 23.

¹³Bernstein Report, *supra*, at page 10.

¹⁴*Id.*, Table No. 4.

¹⁵CWIS, *supra*, at Table No. 18.

move out of the system more quickly than Black and Puerto Rican children.¹⁶

In a longitudinal study of 624 children who entered foster care in 1966, Dr. David Fanshel found that 39% of the children were still in foster care at the close of the study five years later.¹⁷ Twenty-four percent of the sample had been discharged to the parent in the first year, 13% in the second year, 8% in the third year, 9% in the fourth year, and 7% in the fifth year.¹⁸ Furthermore, Dr. Fanshel found that the longer a child was in foster care, the more he was subject to replacement. In the same sample of 624 children, approximately 200 experienced inter or intra agency transfer.¹⁹ Of the children discharged in the first year, 80% were in one placement. Of those discharged in the second year, 60% remained in one placement, and of those discharged in the third year, 39% remained in one placement during their stay in foster care.²⁰

Presently, a child enters the New York child care system either through a voluntary placement by a parent or legal guardian or through an order of the Family Court. Seventy-eight percent of children in foster care

¹⁶Deposition of Dr. David Fanshel taken on April 8, 1975 (*Offer v. Dumpson, supra*). The average length of stay in foster care in New York City is 5.4 years. Research Center, Child Welfare League of America. “A Second Chance for Families. Evaluation of a Program to Reduce Foster Care,” page 8 (1976). (“A Second Chance For Families.”)

¹⁷Fanshel Deposition, *supra*, at page 22.

¹⁸*Id.*, page 22.

¹⁹*Id.*, page 24.

²⁰*Id.*, page 125.

are voluntarily placed and twenty-two percent are court ordered placements.²¹ In both cases, the Commissioner of Social Services, with whom the child is placed, has authority to place the child either in a foster home or facility under the direct supervision of the local Department of Social Services or in the care of a voluntary child care agency licensed or chartered by the State Board of Social Welfare and under contractual agreement with the local Department of Social Services.²²

Children placed directly by the New York Family Court into foster care as a result of child protective,²³ juvenile delinquency²⁴ and person-in-need-of-supervision²⁵ proceedings are afforded certain due process rights as provided for within the New York Family Court Act.

The alternative route for a child into foster care allows a parent or guardian to transfer voluntarily custody and care of the child to the Commissioner of Social Services.²⁶ Voluntarily placed children are statutorily defined as "destitute," "dependent" or "abandoned" children. Within 30 days of the entry of the child into the foster care system, the Commissioner of Social Services petitions the

²¹CWIS, *supra*, at Table No. 11.

²²New York Social Services Law §398(6)(g). About 85% of the children in foster care from New York City are in placement with voluntary child care agencies. Outside of New York City, most children are in foster homes and facilities under the direct supervision of the local Department of Social Services.

²³FCA §1012.

²⁴FCA §731.

²⁵FCA §732.

²⁶SSL §358-a.

Family Court for approval of the placement.²⁷ This hearing, however, is a perfunctory one and the question of the child's actual need for placement is not closely scrutinized.

"... Children [are matched] with voluntary child care agencies' services based on their self-defined admissions criteria [which] must inevitably contribute to decisions based on expedience. Thus, some trained observers have come to question whether the numbers of children now in foster care and the kinds of care offered them may not be largely a function of spaces available rather than empirical reflections of the needs of children and families."²⁸

A parent or guardian may request the return of his/her child at any time. If the Commissioner of Social Services or the child care agency with which the child resides denies the request or does not act, the parent or guardian may commence a proceeding in Family Court or file a writ of habeas corpus for the return of the child.²⁹ If the Commissioner of Social Services or child care agency has reason to believe that a return of the child to the parent making the request would result in neglect or abuse, A PETITION MAY BE FILED IN THE FAMILY COURT PURSUANT TO F.C.A. ARTICLE 10.

Regardless of how a child enters foster care his/her status is subject to review by the Family Court at various intervals during the placement. In the case of children placed directly by the Family Court, the placement is for an initial 18 month period. At the expiration of this period, the court, after a hearing, may make successive

²⁷SSL §358-a. This hearing is mandatory for those children eligible for AFDC funds while in foster care and is discretionary for those children not eligible.

²⁸Sister Mary Paul, New York State Board of Social Welfare, "Criteria for Foster Placement and Alternatives to Foster Care," p. 1 (1975) ("Sister Mary Paul").

²⁹SSL §384-a.

extensions of the placement for 12 month periods. Alternatively, it may order the child care agency with which the child is in placement either to make a more diligent effort to assist the parent in the return of his/her child or to institute a proceeding to legally free the child for adoption or to allow the foster parent to do so.³⁰

In the case of the voluntarily placed child, Social Services Law § 392 provides that within 18 months of placement the child care agency or foster parent with whom the child resides must petition the Family Court and request review of the child's status. At that time the court may order that foster care be continued; that the agency institute a proceeding to free the child for adoption and if it fails to do so that the foster parents be allowed to; that the agency encourage and strengthen the child-parent relationship in order to facilitate the child's return home; or that the child, if legally free, be placed for adoption.³¹

The statute also provides that the court shall possess continuing jurisdiction over the foster care placement and shall rehear the matter whenever it deems necessary, or upon petition by any party, but at least every twenty-four months.³²

Therefore, in the case of both the voluntarily placed child and the court placed child, egress from the child care system is presently strewn with statutory obstacles. The child placed through court order is subject to successive extensions of placement. The voluntarily placed child may languish in foster care even following a parental request for his/her return because the child care agency

³⁰FCA §1055.

³¹SSL §392.

³²SSL §392(10).

refuses to relinquish custody.³³ The parent or child must then petition the Family Court or institute a habeas corpus proceeding in New York State Supreme Court.³⁴ Moreover, a foster parent can impede a child's return to his/her natural home through § 392 of the Social Services Law or by instituting an equity action under Article 78 of the New York Practice Law and Rules.

As previously indicated, it is only the poor who must rely on New York's public foster care system. Families in the middle and upper income brackets who need services or temporary care for their children are usually able to purchase those services, to place their children in private boarding schools or to rely on relatives. Therefore, only the poor are subject to state scrutiny and procedures when a child and parent wish to reunite following the child's stay elsewhere.

Amicus' experience shows that most children in foster care wish to return to their biological parents whenever possible. Often, these children believe, justifiably, that they were unnecessarily removed from their families in the first instance.

"[W]e are constrained by the historical set of a resource system that is largely placement oriented. Often what is logically appropriate, e. g., locally based family-centered, preventive and sustaining services, is in very short supply because funding supports a history of agency service." Sister Mary Paul, *supra*, at pages 9-10.

This historical bias toward placing children out of their home is more disturbing, in the opinion of *Amicus*, because the vast majority of children who are removed from their natural homes are Black and Hispanic and poor.

³³SSL §384-a.

³⁴*Id.*

(see pp. 10 to 12, *ante*.) *Amicus* perceives the placement-oriented child care system in New York as having a deleterious effect on the functioning of those families in society who are least able to protect their legal and moral rights.

"Many of the children entering foster care for a presumably temporary period get locked into the system for prolonged periods."³⁵ The child-caring agency invests little, if any time, in helping natural families assume the child-caring role.³⁶

"The system operates to perpetuate itself. Child caring agencies are in the placement 'business' and like all organizations tend to structure their activities in ways which are self perpetuating. The plan for the majority of children is continued foster care, with no time limits set for adoption or return home."³⁷

The delay in a child's return to his/her natural home now resulting from the statutory scheme and agency bias in favor of foster care will be compounded by the introduction of the automatic administrative hearing ordered by the lower court. Moreover, foster parents can maintain control over a child until the hearing procedure and subsequent appeals are completed. In effect, children will remain in limbo for a longer period of time without having a home which he/she knows to be permanent.

³⁵*A Second Chance for Families*, *supra*, at page 118.

³⁶Gibbs, Zephora T., "Reuniting Families," Field Foundation Project on Child Care, page 13 (June, 1971).

³⁷*Id.*

ARGUMENT

The transfer of a child from a particular foster home to another foster care placement constitutes a deprivation of liberty which mandates procedural due process protections. However, when a child is to be returned to the natural home no procedural protections are due because the introduction of a due process evidentiary hearing cannot avoid infringing upon the predominant liberty interest that most children have in their natural family relationship.

This Court has established that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, *supra*, at 13 (1967). In *Gault*, the Court held that the claimed *parens patriae* role of the state did not justify the absence of a judicial due process hearing before commitment of an alleged delinquent child to a reformatory.

"[J]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." (*In re Gault*, *supra*, at 18.)

More recently, in *Goss v. Lopez*, *supra*, this Court found that public school children could not be suspended from school, even for under ten days, without prior rudimentary procedures.

In both the juvenile justice and school systems, *Amicus* submits, the application of procedural due process has had a salubrious effect. Despite continued state protests that an "adversary" atmosphere can hamper its efforts to act in a child's "best interests," holding state officials accountable for their actions better assures that such ac-

tions meet the particular state interest involved." Cf. *Matter of Lavette M.*, 35 N. Y. 2d 136 (1974).

"[F]airness can rarely be obtained by secret, one-sided determination of the facts decisive of rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." (*Joint Anti-Fascist Refugee Committee v. McGrath, supra*; *Goss v. Lopez, supra*, at 580.)

While the due process clause has no application unless State action may result in a "loss" to the individual involved (*Joint Anti-Fascist Refugee Committee v. McGrath, supra*), in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Board of Regents of State College v. Roth*, 408 U. S. 564, 571 (1972); *Goss v. Lopez, supra*, at 575-576; *Meachum v. Fano, supra*; *Morrissey v. Brewer, supra*; *Fuentes*

³⁸For example, intervention by social workers from the Juvenile Rights Division of The Legal Aid Society ("JRD") into the dispositional phase of New York City Family Court juvenile cases may have resulted in less recidivism. JRD clients against whom status offense ("PINS") petitions were filed between July, 1973, and May, 1974, who were referred by their attorney to a JRD social worker have shown a recidivist rate, through January 31, 1975, of 11.5%. Those whose dispositional needs were suggested to the Court only by State social workers, who include probation officers, have had a recidivist rate of 23.2%. (Legal Aid Society Report to New York City Criminal Justice Coordinating Council, 1975).

Furthermore, school principals have been known not to be infallible when evaluating the necessity and benefit of a school suspension [Children's Defense Fund of the Washington Research Project, Inc., *Children Out of School in America*, pp. 117-150, (1974) (Library of Congress No. 74-20229)].

v. Shevin, 407 U. S. 67, 86 (1972). As long as the deprivation is not *de minimis*, its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Goss v. Lopez, supra*, at 576; *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 342 (1969) (Harlan, J., concurring).

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colleges v. Roth, supra*, at 569; *Wolff v. McDonnell*, 418 U. S. 539 (1974); *Bell v. Burson*, 402 U. S. 535 (1971); *Goldberg v. Kelly*, 397 U. S. 254 (1970). A cognizable liberty or property interest can either originate in the Constitution or be created "by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez, supra*, at 271-572; *Meachum v. Fano, supra*, at 2539.

In *Gault*, this Court held that the liberty right of a child, protected in the Constitution itself, mandated application of procedural due process. The liberty interest of a child is clear when the state attempts to remove him from his family and confine him in a correctional institution.

In *Goss*, this Court found that children were entitled to procedural due process before school suspension pursuant to both the ban against arbitrary deprivations of liberty under the Due Process Clause and the property interest which they had obtained to an education under state law.

The majority opinion of the three-judge court in the case at bar did not articulate a constitutionally cognizable interest in a child to remain in a foster home, either

through the Constitution itself or in a state law. It is clear that children have no right to remain in a foster home under New York State law. To the contrary, § 383(2) of the New York State Social Services Law, the application of which was declared unconstitutional by the district court, authorizes the child care agency which has custody over a child "in its discretion [to] remove such child from the home where placed or boarded." Similarly, § 400 of the Social Services Law, which was also declared to violate the Due Process Clause, permits City child-care officials to remove children unilaterally from "family homes" under their authority.³⁹

However, as an independent "person" to whom constitutional protections apply, a child who is arbitrarily removed by the state from a family home, albeit a foster home, is deprived of a liberty interest protected by the Fourteenth Amendment. *In re Gault, supra*. It is basic to our notion of society, as well as to a particular child's well-being, that the child live in safe and secure circumstances where he may be well cared for and protected. Thus the nature of the liberty interest—a known and stable home environment—is one to which due process applies.⁴⁰ (See subpoint "B," *infra*.)

³⁹The district court also held that a state regulation (18 N.Y.C.R.R. § 450.14), which allows foster parents to request a post-removal hearing, is constitutionally defective, even though the court found no constitutional rights in foster parents.

⁴⁰Experience must reject an argument that the state's expertise in child care renders procedural due process meaningless.

According to the Bernstein Report, *supra*, at page 37, all 3,951 children in general institutions were inappropriately placed; 2,094 of the 28,800 New York City children in foster care (7.3%) should have been in their own homes, another 3,669 children (12.6%) should have already have been placed for adoption and 3,712 of the 13,185 children in foster homes should have been elsewhere (p. 29). Interestingly, the study concluded that a surplus in available foster homes will continue through 1985 (p. 37).

Therefore, the determination of the district court that New York Social Services Law §§ 383(2) and 400 are unconstitutional because they do not provide a foster child with a due process hearing right, at least when applied to his removal from his foster home and transfer to another foster care placement, is correct.

On the other hand, as more fully appears below, the lower court ruling requiring an automatic administrative hearing for the child prior to return to the natural parent, must be reversed.

A. No hearing is required when foster children are returned to the natural home.

A child is not the "property" of his/her natural parents. But few would disagree that the formation of a healthy and secure relationship between a child and his/her natural parents can provide a significant foundation for the child's positive social adjustment. Indeed, this Court has firmly supported the integrity of the biological family unit. *Stanley v. Illinois, supra*, at 650-652; *May v. Anderson, supra*, at 533; *Meyer v. Nebraska, supra*; *Pierce v. Society of Sisters, supra*.

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply no hinder." (*Prince v. Massachusetts*, 321 U. S. 158, 166 [1944].)

State interference with the natural family unit constitutes a deprivation of "a basic liberty," fundamental to the very existence of the human race. *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942). Hence, this Court has found that only under the most compelling circumstances may the state intervene in the parent-child relationship.

May v. Anderson, supra; Wisconsin v. Yoder, 406 U. S. 205, 213 (1972).

Likewise, the highest court in New York State has recognized that "[c]hild and parent are entitled to be together, unless compelling reason stemming from dire circumstances or gross misconduct forbid it in the paramount interest of the child . . ." *Spence-Chapin Adoption Service v. Polk*, 29 N. Y. 2d 196, 199 (1971). The recognition and preservation of the natural parent's "primary love and custodial interest, and the future life of the mother and child together . . ." have been premised upon "the child's best interests." *In re Jewish Child Care Association, supra*, at 230 (1959).⁴¹

Children possess a liberty interest in the preservation of their natural home independent of the parents' right to maintain custody of their children. Waiver of the parental right does not extinguish the child's liberty interest since parents are morally and legally obligated to provide care for their children. E. g., *Prince v. Massachusetts, supra*; Family Court Act §§ 561, 562 ("proceedings to compel support by mother and father").

Recognizing this independent interest, the New York State Court of Appeals recently ruled that "[t]he [biological] parent has a 'right' to rear its child, and the child has a 'right' to be reared by its [biological] parent."

⁴¹This interest is sometimes referred to as the right to "family integrity." Cf. *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10, 15 (S.D. Iowa 1975); *Roe v. Conn.*, 417 F. Supp. 769, 777 (M.D. Ala. 1976). It is protected as "liberty" by the due process clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, under the principle of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and by the equal protection clause of the Fourteenth Amendment, *Stanley v. Illinois, supra*.

Bennett v. Jeffreys, supra. In sum, our judiciary has recognized the liberty interest of a child in his natural family relationship.

Children who are removed from a foster home to return to their natural parents are deprived of that liberty interest which has attached to their foster family relationship (see pp. 21 to 22, *ante*). But in turn they reassume the liberty interest they possess in their natural family relationship of which they had been deprived when placed, often arbitrarily and without sufficient procedural protections. Thus, the question is raised as to which "liberty interest" is predominant.

Amicus submits that in all but a few cases the "gain" derived from a child's return to the natural parents more than offsets any "loss" resulting from the removal from a foster home. In essence, the termination of the child's liberty interest in his foster home produces a significant gain rather than a loss when his biological family unit is reestablished.⁴² Therefore, in this specific and unusual situation, the overall state action obviously cannot be said to "cause a sufficiently grievous loss to amount to a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment." *Meachum v. Fano, supra*, at 2540 (Stevens, J., dissenting); *Mathews v. Eldridge*, — U. S. —, 96 S. Ct. 893, 902 (1976); *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 168.

⁴²Admittedly, the foster care system, all too often, provides long-term care rather than meeting its mandate to give temporary care to children until they are able to return home or are adopted. *Spence-Chapin Adoption Service v. Polk, supra*; *In re Jewish Child Care Association, supra*. However, the general failure of the system to fulfill its mandate should not be legitimized by prolonging the "temporary" placement of those children who can return home.

The experience of *Amicus* dictates, however, that a few children have an attachment with their foster family which outweighs the benefit derived from their return to their natural family. These are exceptions. Yet, they are difficult to ignore since in these exceptional cases a deprivation may occur which cannot be considered *de minimis*. *Board of Regents v. Roth, supra*; *Goss v. Lopez, supra*. Thus, at first glance, it would appear that a due process hearing mechanism could be instituted to protect the exceptions without impinging the right of the majority to return expeditiously to their natural home.

Unfortunately, an anomalous situation has been presented to the courts. The district court's holding that a hearing "should be provided as a matter of course" (418 F. Supp., *supra*, at 285) (emphasis supplied) appears logical in light of a child's inability to assert his right without adult assistance. The ability of a child to "waive" a hearing voluntarily and informedly is suspect to say the least. But this is not a situation where implementation of procedural mechanisms before state action will protect the constitutional rights of some without harming others who would be personally satisfied with the state action. E. g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 923, 927 (2d Cir. 1968); *Lynch v. Baxley*, 386 F. Supp. 378, 386 (M. D. Ala. 1974). Rather, subjecting all children to a procedural hearing before they can return from a foster home to their natural home will have substantial and damaging substantive effects on the vast majority whose predominant liberty interest lies in their natural family relationship.

First, any procedural mechanisms designed to scrutinize the propriety of a child's return from foster care to his

natural home will result in delay.⁴³ Children whose rights and needs can best be met with their natural family will be compelled to undergo a further factual inquiry into and interference with their family relationship before being permitted to live with their biological parents, reinforcing the existing bias against returning children to their natural home (see "Description of New York Child-care System," *ante*).

Second, there would be grave danger that child-care agencies would forego making a decision to return children to their natural parents because of bureaucratic reluctance to hold administrative hearings. From a bureaucratic point of view the easier course would be to perpetuate the foster home placement, especially in a placement oriented system (p. 18, *ante*). As a result, children who were supposedly placed for temporary care would linger away from their natural family.

The district court seemingly ignored the substantial loss to a child whose reunion with his biological family unit is delayed by more extensive bureaucratic red-tape than now exists.⁴⁴ If, as the district court appears to

⁴³It is important to note that presently child care agencies evaluate the natural home before returning the child to it. If the agency believes the home to be unfit, it has judicial remedies to prevent the natural parents from regaining custody. (pp. 15 to 18, *ante*).

⁴⁴The description of the child care system contained in this brief illuminates the already dilatory process now in existence to return a child to his/her natural home. For example, child care agencies investigate the home before a decision is made to return a child. Moreover, foster parents have several ways of delaying a child's return, including seeking a stay of the removal and a hearing under § 392 of the Family Court Act (if the child has resided with them for 18 months) or even instituting a general equity action (Article 78 of the New York Civil Practice Law and Rules).

have said, when a child is to be returned to his natural home the hearing will only involve the question of whether the evidence indicates "abuse" or "neglect" (418 F. Supp., *supra*, at 283), its "salutary function" (*id.*), given the already existing protections against "abuse" and "neglect," is unequivocally outweighed by the deleterious effect of delaying a child's return to his natural home.

On the other hand, if the hearing is likely to establish under FCA, Article 10, a less stringent standard than "abuse" or "neglect" for retaining a child out of his natural home, *Amicus* would strongly object to such standard as violative of a child's liberty right to his natural family relationship. Cf. *Stanley v. Illinois*, *supra*; *May v. Anderson*, *supra*; *Spence-Chapin Adoption Service v. Polk*, *supra*; *Bennett v. Jeffreys*, *supra*.

Equally disturbing is the likelihood that children may be "brainwashed" into falsely believing that their natural parents are unconcerned about them by persons who have an interest, perhaps financial, in maintaining custody of the child.⁴⁵ In the previously cited Gibbs Report, *supra*, at page 18, a study concerning the feasibility of earlier return home of children in foster care, it is stated that:

"There seems to be a bias operating against the natural family. . . . The bias against the natural family is transferred to the children. They are made to feel that it is wrong to want to be with their natural families. It is preferable to want to remain in the foster setting."

⁴⁵Foster parents receive about \$2,000 annually to care for a child, plus a clothing, dental and medical allowance. [*Offer v. Dumpson*, *supra*, at 281n. 11]. Although *Amicus* does not suggest that all foster parents are financially motivated, the Court should note that the Bernstein Report, *supra*, at 37 suggests an oversupply of foster homes.

An automatic hearing will violate the liberty rights of children in foster care who seek to return to their natural homes. The delay which will result from more extensive bureaucratic procedures than now exist will produce a continuing substantive constitutional violation.

Amicus suggests to the Court that it apply a balancing test in order to resolve the questions raised in this unprecedented situation where an automatic administrative hearing will violate constitutional rights of the persons given the hearing. "Rules of procedure" . . . should . . . be shaped by the consequences which follow their adoption." *Wolff v. McDonnell*, *supra*, at 567.

"'Due Process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [It is] compounded of history, reason, the past course of decisions. . . ." (*Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 162-163 [concurring opinion]; *Cafeteria and Restaurant Workers v. McElroy*, *supra*, at 895.)

In balancing all the competing interests involved (*Cafeteria and Restaurant Workers v. McElroy*, 367, *supra*, at 895; *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 163), *Amicus* has concluded that the constitutional rights of more children would be impinged than protected through the introduction of a due process evidentiary hearing before their return to their natural family. In effect, an administrative hearing is not due. *Morrissey v. Brewer*, *supra*.

Amicus emphasizes that it is not suggesting that individual children may not challenge their removal from a foster home either through the courts or otherwise even when they are returning to their natural home. Rather, *Amicus* submits that given the "time, place and circumstances" (*McGrath*, *supra*), of the present child

care system an administrative hearing before children are returned to their natural homes will, on balance, thwart rather than serve the rights of children in foster care.⁴⁶

B. A pre-removal due process evidentiary hearing is required when a child is to be transferred from a particular foster home to another foster care placement.

When a child is subjected to a transfer from one foster home to another or from a foster home to an institution, the liberty interest in his foster family, which is severed by the state action, is not offset by a subsequent gain as it is in the case of a child's return to his natural parents.

The liberty interest is a known and stable home environment. A transfer to another foster home may subject the child to a "grievous loss" mandating due process safeguards. *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*; *Meachum v. Fano*, *supra*. The child is thrown into an alien environment in which he/she has no biological or even psychological bonds. Evidence including testimony by experts for both the natural and foster parents in the court below highlighted the possible traumatic effect of repeated transfers from one foster family to another. *OFFER v. Dumpson*, *supra*, at 282-283; see Robert H. Mnookin, "Foster Care; In Whose Interest?" in

⁴⁶It should be noted, however, that in nearly all situations where a child wishes to remain in a foster home and the foster parent wishes to keep him/her, the foster parent will protect the child's interest either by asserting their statutory rights under SSL § 392, filing an equity action or seeking to institute a neglect proceeding under Article 10 of the Family Court Act.

The Rights of Children, Harvard Educational Review (1974), p. 184.⁴⁷

When a child is transferred from a particular foster home to an institution the deprivation of liberty is even more severe. Conditions in institutions and the effect of institutionalization upon children have been the source of extensive litigation, reports and studies, and popular literature. *NYSARC v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Texas 1974); Forer, L., *No One Will Listen*, John Day (1971); Cole, L., *Our Children's Keepers*, Fawcett World (1974). See also *Bartley v. Kremens*, No. 75-1064, Brief of Amicus Curiae American Orthopsychiatric Association, *et al.*, to this Court. Undoubtedly, the transfer triggers application of the due process clause.

Hence, in both transfer of a child to another foster home and to an institution, the question becomes what process is due. *Morrissey v. Brewer*, *supra*. An application of the three-part test for determining the "specific dictates of due process" enunciated in *Mathews v. Eldridge*, *supra*, at 903, initially suggests that an evidentiary hearing instituted by the child or an independent party acting on his behalf at which all information regarding the child's needs and desires are made known is necessary. The child, therefore, will need an independent representative who may then call a non-party foster parent to give

⁴⁷The foster parents have no equivalent liberty interest in the foster child. They independently and voluntarily contract to care for the child in return for monetary compensation. *Offer v. Dumpson*, *supra*, at pages 280-281. As opposed to the natural parent the foster parent has no obligation to care for a child and may sever its relationship with the child whenever it desires to do so. However, the child is subjected to the foster care system usually though no fault of its own and is dependent upon adults for "custody, care and nurture" *Prince v. Massachusetts*, *supra*.

testimony.⁴⁸ The hearing must take place before the transfer. Delay in removal occasioned by a hearing creates no risk of harm (as opposed to delay in returning a child to his natural home) whereas great injury to the child may occur before a post-removal hearing results in a reversal of the transfer.⁴⁹

The suggested hearing will not place an undue fiscal or administrative burden on the child care agencies.⁵⁰ In fact, state and local officials in New York currently carry out administrative hearings when requested by foster parents, except when a child is being returned to his natural home. *OFFER v. Dumpson, supra*, at 285. Moreover, to the extent the hearings negate transfers to institutions they will save the state and city substantial sums of money.⁵¹

In summary, *Amicus* believes that due process procedural protections will have an ameliorative effect. Children will not be shunted unnecessarily from one foster home to another, nor will inappropriate institutionalization be effectuated as easily.

As indicated earlier, the majority of children now in foster care are inappropriately placed.⁵² The govern-

⁴⁸The foster parent should not be a party as of right to such a proceeding because it does not have a constitutionally protected liberty interest or statutory right to maintain the child in its home.

⁴⁹An emergency may arise which would warrant immediate removal.

⁵⁰In his deposition in the court below Dr. David Fanshel testified that the tendency of agencies is not to move children from one foster home to another (pp. 70-71).

⁵¹The per child per year cost in a foster home is \$5,200 and in a general institution is \$34,000. (Bernstein Report, *supra*, p. 44).

⁵²Bernstein Report, *supra*, p. 29.

mental interest in assuring that each child receives appropriate care in no way will be stifled as a result of the implementation of due process procedures. In fact, holding child care officials accountable for their actions concerning foster children will better assure that such actions are legitimate and, therefore, that the governmental interest in providing appropriate child care is being fulfilled.

CONCLUSION

For the foregoing reasons *Amicus* respectfully urges this court to affirm that part of the District Court's judgment and order which declared Social Services Law §§ 383(2) and 400 and 18 New York Code Rules and Regulations 450.14 unconstitutional when applied to a foster child's transfer from a foster home to another foster care placement, and to reverse that part of the District Court's judgment and order which declared said statutes and regulations unconstitutional when applied to a foster child's return to the natural home.

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JAN 17 1977

In The
Supreme Court of the United States

October Term, 1976

76-180 J. HENRY SMITH, *etc. et al.*,

against Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR
 EQUALITY AND REFORM, *etc. et al.*, Appellees.

76-183 BERNARD SHAPIRO, *etc. et al.*,

against Appellants-Defendants,

ORGANIZATION OF FOSTER FAMILIES FOR
 EQUALITY AND REFORM, *etc. et al.*, Appellees.

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,

against Appellants-Intervenors,

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 EQUALITY AND REFORM, *etc. et al.*, Appellees.

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,

Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR
 EQUALITY AND REFORM, *etc. et al.*, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
 COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF A GROUP OF CONCERNED PERSONS
 FOR CHILDREN FOR LEAVE TO FILE
 BRIEF AMICI CURIAE AND BRIEF
 AMICI CURIAE**

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

1. Pursuant to Supreme Court Rule 42(3), a group of Concerned Persons For Children made up of James P. Comer, Anna Freud, Joseph Goldstein, C. Henry Kempe, Marianne Kris, Peter B. Neubauer, Sally Provence and Albert J. Solnit, moves the Court for leave to file the attached brief as *amici curiae*.

The members of the group have devoted a major part of their professional lives as pediatricians, child psychiatrists, and psychoanalysts to understanding and safeguarding the physical and emotional growth of children. They are experts from diverse schools and training in child and family development. Their concerns have focussed on how to maintain children in the care and custody of their own families and how to provide alternatives for them when they become victims of abuse, neglect or abandonment or when they cannot be cared for by their parents.

James P. Comer, Maurice Falk Professor of Child Psychiatry and Associate Dean of the Yale School of Medicine, is scholar, clinician and writer whose books, *Beyond Black and White* and *Black Child Care*, have opened a new chapter in our understanding of the pressures on and challenges to growing up Black in the United States.

Anna Freud, Director of the Hampstead (London) Child Therapy Centre, is the originator of child psychoanalysis and is a pioneer in day care for young children of the poor. During the blitz in war-torn London, Dr. Freud established model nurseries to care for children who could not stay with their parents. Her reports from the Hampstead nurseries provide scholarly insights and practical standards for how temporary foster care can and should be provided for children and their parents even under the most difficult conditions.

Joseph Goldstein, Walton Hale Hamilton Professor of Law, Science and Social Policy at Yale Law School and Professor at the Yale Child Study Center is a lawyer and psychoanalyst. He has written extensively in

family law and is, with Anna Freud and Albert J. Solnit, author of *Beyond The Best Interests Of The Child*.

C. Henry Kempe is Director of the National Center for the Prevention and Treatment of Child Abuse and Neglect and Professor of Pediatrics and Microbiology at the University of Colorado Medical Center. His research on small pox was responsible for saving the lives of many children the world over. He was the first to research into causes of the battered child syndrome and to develop model intervention programs to protect children from child abuse.

Marianne Kris, of New York City, is a child psychiatrist and psychoanalyst. She has been the teacher and counsellor of scores of experts in the care and treatment of children throughout the United States and Europe.

Peter B. Neubauer, Director of the Child Development Clinic of the Jewish Board of Guardians, is child psychiatrist and psychoanalyst. Teacher, researcher and clinician, he has established model child care facilities for vulnerable children in New York City.

Sally A. Provence, Professor of Pediatrics and Director of the Child Development Unit at Yale Child Study Center, is a psychoanalyst and expert in early child development. Dr. Provence is known for her studies of children in institutions and of children born into high risk environments. She is author of *Infants In Institutions*.

Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry at Yale Medical School and Director of the Yale Child Study Center. He is Senior Editor of the

Psychoanalytic Study of the Child, a past President of the American Academy of Child Psychiatry and currently President of the International Association for Child Psychiatry and Allied Professions.

Two members of the group, Drs. Goldstein and Solnit, as expert witnesses in child development, not as experts in law, gave depositions in this case.*

2. Out of concern for all children, particularly for the children of the minority urban poor, who are the primary victims of abuse in the current administration of foster care, the group of Concerned Persons For Children was formed to render such assistance as it can to the Court's deliberations in this case.

The case is of major interest to the group, because the Court's decision can directly affect the lives and well being of the more than 350,000 children who are now in foster care and the countless thousands more who may in the future be in foster care in the United States.

3. The members of the group do not seek to press upon the Constitution a particular theory of human nature. Rather they seek only to have recognized

* Appellants' Joint Appendix To Jurisdictional Statement pp. 191a-235a.

Amici have served and continue to serve in an advisory capacity to numerous public and private bodies. Anna Freud is on the Advisory Board of the Organization of Foster Families for Equality and Reform Inc. Joseph Goldstein and Albert J. Solnit are members of the same advisory board, and are members of the Expert Panel of the New York State Board of Social Welfare's Monitoring Project.

The Institutional association of *amici* is provided for identification purposes. They do not necessarily represent the view of their institutions.

what is a universal experience of humankind, the familial bond that develops between parents and children in their long term care. The life support system provided children in the form of long term foster parents must not be withdrawn without anything less than careful consideration of the impact of such action upon the child and of the adequacy and availability of permanent parents. It is the process for withdrawing such life-support systems from the child, not the substantive basis for such action, that is in issue here. The group argues only that before a child and his long term foster parents are separated, the process should provide a full hearing for all concerned parties before an impartial and independent decisionmaker. The group, prompted as much by common sense as by its collective expertise, asks the Court to confirm the unconstitutionality of state action which forcibly breaks familial bonds without a process which can protect against discrimination, whim and caprice.

4. Consent to the filing of a brief by the group, as *amici curiae*, was obtained from Appellees, but was refused by Appellants-Intervenors, by Appellants-Plaintiffs and by Appellants-Defendants J. Henry Smith, *etc. et al.* At the time of printing, no response to letters requesting consent was received from Appellants-Defendants Bernard Shapiro, *etc. et al.*

5. In light of the substantial impact on children and their parents which the Court's decision in this case inevitably will have and the complexity of the issues involved, the group of Concerned Persons For Children urges the Court to grant this Motion and grant

the group leave as *amici curiae* to file the attached brief.

Dated this 15th day of January, 1977.

Respectfully Submitted,

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Brief:*

CAROL LARSON
GERALDINE PERILLO

In The
Supreme Court of the United States
October Term, 1976

76-180 J. HENRY SMITH, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc. et al.*, *Appellees.*

76-183 BERNARD SHAPIRO, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc. et al.*, *Appellees.*

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,

Appellants-Intervenors,

against

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc. et al.*, *Appellees.*

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,

Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR
EQUALITY AND REFORM, *etc. et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF A GROUP OF CONCERNED PERSONS
FOR CHILDREN AS AMICI CURIAE

INTEREST OF AMICI CURIAE

A description of *Amici* and their interest is set forth
in the above Motion for Leave to File Brief *Amici
Curiae*.

SUMMARY OF ARGUMENT

At issue in this case are the long term relationships that develop between foster parents and the children entrusted to their care. The question is whether the State of New York can terminate these relationships without a modicum of procedural justice.

The *amici* are a group of professionals deeply concerned with the welfare of children. Their interest in this case is not to further some school of thought or dogma. Rather, their interest is in the welfare of children. Their professional activities have made them see, more clearly, what is accessible to all people. It is only upon this common experience and a deep concern for children that they draw.

This common experience, recognized by The District Court in this case, reveals that the relationship between foster parents and children in their long term ~~case~~ is of sufficient intimacy and intensity to constitute an interest worthy of protection under the due process clause. It is a familial bond. It is a liberty interest comparable to that recognized in *Stanley v. Illinois*, 405 U.S. 645 (1971), as requiring due process before it is terminated. The development of this familial bond between foster parents and the children in their long term care cannot be prevented by contract or by declarations of intent by the State of New York.

Once the existence of the familial bond is recognized, the question in this case is who should speak for it. The counsel appointed by the District Court for the foster children, Helen L. Bittenwieser, has opposed preseparation hearing; and on the basis of this disclaimer the State argues that there is no "case or controversy." This argument fails because it ignores

the role of the foster parents. The foster parents are an integral part of the protected relationship, and they can speak for that long term relationship in their own right. They can insist that the relationship -- their liberty interest -- should not be terminated without a hearing. They can also claim the liberty interest of their foster children. The District Court appointed counsel for the foster children in order to make certain that all viewpoints were fully aired. But appointed counsel did not become the exclusive spokesman for the children. Until the foster care relationship is terminated and the long term foster parents are dislodged they are as much entitled to speak for the children entrusted to their custody as appointed counsel or as representatives of the State.

The protection sought in this case is not substantive. To mandate a pre-separation hearing does not require the Court to take sides between biological and foster parents in the relatively few cases in which foster parents and biological parents may be in conflict. In New York dismemberment of foster families does not typically result in the children being reunited with their biological parents. Rather, it is generally the case that New York State foster children, including many of the named children in this action, face the prospect of being separated from their foster parents and placed with strangers. *Amici* urge only that before separation a full hearing be provided to resolve, in accord with state law, any conflicts between interested persons.

The protection sought in this case is exclusively procedural. Under *Mathews v. Eldridge*, ____ U.S. ____, 96 S.Ct. 893 (1976) a pre-separation hearing before an independent agency is required because: (1) the harm

suffered by an erroneous separation is in the deepest sense irretrievable; (2) the substantive standards used for termination -- for example, what is in the best interests of the child -- are sufficiently complex to create a high risk of error; and (3) pre-separation hearings would further the public interest. There is no basis for creating an exception to the *Mathews* rule on the theory -- wholly specious -- that the impersonal relationship between the State and the child is the equivalent of the personal relationship between individual parent and child.

The *amici* believe that procedural justice requires New York to establish a system for affording pre-separation hearings. New York should have considerable latitude in designing the system, but at a minimum it must contain these elements: (1) the hearing must precede the termination; (2) the agency must give notice to long term foster parents of its proposed action, the grounds for its action and the right to a hearing; (3) prior to the hearing the agency must give the foster parents access to its files; (4) the hearing must be on the record, assure the right of cross-examination, and that all interests are adequately represented; and (5) the hearing must be held before an impartial and independent decisionmaker.

To ignore these requirements is to ignore the familial bond that arises out of the long term relationship between foster parent and child.

ARGUMENT

I.

THE RELATIONSHIP BETWEEN FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS IS A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

The liberty interest asserted here is the "familial bond" which is established between a child and the adult who cares for that child. That interest is firmly centered in the spectrum of constitutionally cognizable family rights.

The Court has recognized at least two separate parent-child interests that are protected by the Fourteenth Amendment. One is the entitlement of natural parents and their children to each other, an interest which rests on the fact of biological reproduction and arises when the child is born. The other protected interest, which appellants ignore, is in the "familial bonds" which develop over time, not only between biological parents and the legitimate or illegitimate children in their long term care, but also between adopting parents and the adopted children in their long term care as well as between foster parents and the foster children in their long term care.

Stanley v. Illinois 405 U.S. 645 (1971) involved a biological parent but the Court recognized both types of interest. *Stanley* acknowledged that "familial bonds" between parent and child derive from the "custody, care and nurture, of the child" by the parent. *Id.*, at 651, 652. *Stanley* had lived with his illegitimate children all of their lives. *Id.*, at 650 n. 4. The Court noted that such familial bonds "were often as warm, enduring and important as those arising within a more formally organized family unit." *Id.*, at 652.

The existence of the familial bonds, recognized in *Stanley*, does not depend on the biological relationship between an adult and a child. Rather, they are created by an adult caring for his child over a period of time. In a long term foster home the child gains membership in a small, closed unit, receives nurture and protection by caring adults, and enjoys a feeling of being wanted, "looked after" and appreciated. Familial bonds develop whether the caretaking parent is married or unmarried, biological or foster, and are deserving of due process protection under the Fourteenth Amendment.

From the child's point of view fostering is not temporary where it exceeds the period of time during which individual children (always according to their ages) can preserve any previous inner tie to an absent parent.¹ Where foster parents are adequate and return

¹In this case the named plaintiff foster children had been with their respective foster parents for substantially longer than one year. Eric and Daniel Gandy had been with their foster mother, Madeline Smith, continuously for four years when she was notified that they were to be removed from care because "it is now in their best interests to leave your home." *Organization of Foster Families For Equality and Reform v. Dumpson*, 418 F. Supp. 277, 280 (S.D.N.Y. 1976). (hereinafter referred to as "District Court Opinion") Mr. and Mrs. Lhotan cared for their foster children, Cheryl and Patricia Wallace, continuously for approximately four years, and for the two younger Wallace children, Cynthia and Cathleen, for approximately two years when the Lhotans were notified that their foster home was to be broken up. *Id.*, at 280. Rafael Serrano has been cared for by his foster parents, Mr. and Mrs. Goldberg, continuously since 1969; prior to that time Rafael had lived with a succession of foster families after having been abused by his biological parents. *Id.*, at 280.

The situation of these children is more typical of the "temporary" indeterminate system of foster care provided by New York State than the situation of the children of the intervenor parents. As the District Court found: "[T]he average child placed in foster care remains within the system for approximately 4-½ years." *Id.*, at 281.

affection, new familial bonds are formed and over time become consolidated.² As fostering time lengthens, and where no further separations follow, the new relationship will occupy more and more the place of the former one, as happens in adoptions. From this point, the foster parent-child relationship deserves all the recognition and protection that the biological parent-child relationship is entitled to and actually receives. Separation from the long term foster parent will be no less painful and no less harmful to the well-being of the child than is separation from the biological parent. Typically, in New York, the separation results in another foster placement,³ but even if it does not the pain and detrimental consequences of separation will not be lessened by return to biological parents who, in the meantime, may have become strangers.⁴

The notion that affectionate and meaningful ties develop between humans in close association over time -- children with adults, adults with adults, children with children -- is not the monopoly of any one discipline or of any one school within a given discipline. It is no one's dogma. It is bedded in the common experience of all peoples. It is reflected in the Constitutional protections to be free to associate with one another, to be

²Though any specific time period is arbitrary, amici believe it is unrealistic from the child's point of view to presume that very significant familial bonds will not have developed by the time a child has been in the care of the same foster family for a year.

³R., Answers of state defendants Lavine and Shapiro to plaintiffs' interrogatories, Aug. 12, 1974; R., dep. of Prof. David Fanshell, pp. 113, 119, Exh. A and B, p. 161. Motion to Affirm of Appellees' Organization of Foster Families for Equality and Reform, dated August 31, 1976, p. 11. And see District Court Opinion at 279 fn. 6.

⁴J. Goldstein, A. Freud, A. Solnit, *Beyond The Best Interests Of The Child*, pp. 17-20 (1973), and Goldstein, *Why Foster Care -- For Whom And For How Long?*, 30 *The Psychoanalytic Study of the Child*, 647 (1975)

secure in one's own person and to be secure in one's own home. It is the core meaning of both life and liberty and the pursuit of personal fulfillment which the Fourteenth Amendment of the Constitution protects from intrusion except with due process.

The State argues that, when it places a child in foster care, it explicitly indicates that it does not intend to create an intimate bonding, an intent which is evidenced by the terms of foster parent contracts. A substantially analogous argument failed to persuade Mr. Justice Harlan in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), upon which he later relied in his concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965). There, the State argued that marriage did not carry with it the right to use contraceptives because the state issues marriage contracts on the explicit condition that the parties not use contraceptives. Mr. Justice Harlan could not accept that argument because it ignored human nature and the intimacy necessarily spawned by the marriage relationship. The state, having sanctioned the marriage institution, could not disregard the consequences of its action and pretend that state regulation of the details of sexual intercourse among married couples is consistent with that relationship.⁵ Similarly, when the state leaves

⁵"... [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." *Poe v. Ullman* 367 U.S. 497, 553 (1961)

the child in a foster family for a substantial period, it is impossible for adult and child to remain neutral business partners. The State's claim that no relationship of importance should have developed is ridiculous. The Fourteenth Amendment demands, as Mr. Justice Harlan recognized in *Griswold*, that the state not be permitted to ignore the human consequences of its action.

II.

A "CASE OR CONTROVERSY" EXISTS BETWEEN NEW YORK STATE AND FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS.

Having established a constitutionally protected interest in a familial bond, the question becomes who can speak for it. This question arises because Helen L. Bittenwieser, the court-appointed counsel for the foster children, opposes a pre-separation hearing. Because of this, the State argues, there is no "case or controversy." This argument fails; a "case or controversy" is present because the constitutional rights of long term foster parents as well as long term foster children are threatened with injury by new York State procedures. Further, appointment of counsel for children did not make her their exclusive spokesman. Her appointment in no way vitiates the entitlement of long term foster parents to assert the rights of their long term foster children.

A. The Interests Of Long Term Foster Parents Are Directly Threatened With Injury By The Absence Of A Full Pre-Separation Hearing.

Foster parents have a cognizable interest in the familial bonds between them and their long term foster

children. Not unlike such other cognizable and substantial liberty interests as freedom of speech, freedom of association and the right to vote, the "familial bond" is a "reciprocal right."⁶ The District Court did not rest its decision on the potential injury to the foster parents' interest in this reciprocal relationship because it found the potential injury to each child's interest sufficient. Nevertheless, the District Court acknowledged that none of the Appellants "dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed." District Court Opinion at 280. When these familial bonds are severed by the State, long term foster parents, not to mention their children, suffer "concrete injury from the operation of the challenged statute" and with respect to the demand for a hearing "[t]he relationship between the parties is classically adverse and there clearly exists between them a case or controversy in the constitutional sense." *Singleton v. Wulff*, ___ U.S. ___, 96 S.Ct. 2868, 2873 (1976).

⁶In *Stanley v. Illinois*, 405 U.S. 645 (1971), the Court explicitly stated that the parent's interest is "in retaining custody of his children," and that the children's interests in their parents is in not suffering "uncertainty and dislocation." *Id.*, at 652 and 647. And see, *Virginia Pharmacy Bd. v. Virginia Consumers Council*, ___ U.S. ___, 46 S. Ct. 1817, 1823 (1976): "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases [citing many] . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." The Court, it should be further noted, recently cited with approval reference to "freedom of association in the home." *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 535 n. 7 (1972) quoting 345 F. Supp. 310, 314 (D.D.C. 1972).

B. Foster Parents Are Entitled To Assert The Rights Of Their Long Term Foster Children.

Children have no legal capacity to speak for themselves, or to select and to retain their own counsel to represent them. In most cases involving children, parents speak for them. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the foster care situation, biological parents typically are not available to speak for them; even where they are, the situation is complicated by the prior intervention of the state as temporary custodian and by the presence of the long term foster families as the caretaking parents of their long term foster children. The purpose of a pre-separation hearing is to sort out these relationships.

From the child's point of view no generalization can be made either that all children who have been in foster care with the same family for a year or more should be separated from their foster parents or that all such children should remain with their foster parents.⁷ The only way to ensure that no child is deprived of a family without due process is to conduct a hearing in each case at which all those claiming to be the adult parties in the parent-child relationship can present their views. Until that hearing is convened and the foster family is dismembered with adequate process, the right of the foster parents to speak for the children in their long term care is at least as great as the right

⁷See footnote 2 *supra*.

of the State, the biological parents or the court-appointed counsel.⁸ Just as appointment of counsel for children in a divorce custody dispute or neglect proceeding does not foreclose the right of separating or allegedly neglecting parents to speak for their children, so the appointment of Helen L. Bittenwieser does not vitiate the standing of the long term foster parents in this case to speak for the children entrusted to their care. A scrupulous concern for possible conflict of interest led to the appointment of *separate* but *not* of *exclusive* representation for the children.

Separate counsel for the foster children was appointed because the District Court believed that counsel for the foster parents could not "provide effective assistance to the court in defining, articulating and exploring those interests of the children which are *potentially* adverse to those of the foster parents."⁹ Her function was to serve as a fail-safe mechanism -- to ensure that all points of view were presented. But her voice was not intended to silence all others. None

⁸The District court, ruled that each child is entitled to a hearing before "he can be peremptorily transferred from the foster home in which he has been living." District Court Opinion at 282. Foster parents have standing to assert their foster children's right to such hearing both because of the relationship between them and because if they were denied standing the children's constitutional right might be diluted. Cf. *Singleton v. Wulff*, ___ U.S. ___, 96 S.Ct. 2868, 2874 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 445-446 (1972); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958); *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953).

⁹Appellants' Joint Appendix To Jurisdictional Statements p.64a (emphasis supplied) - Judge Carter's opinion, dated December 10, 1974, denying the Civil Liberties Union's motion to be retained as counsel for the foster children, or, in the alternative, to appoint Dr. Kenneth Clark as guardian *ad litem* to the children. "The court has acted on its own motion on behalf of the children in retaining counsel for them. The court's action is similar to that of a party in retaining counsel on his own behalf..." *Id.*, at 67a.

of her clients, not even the originally named foster children could instruct her as to their desires, ignore her advice, express dissatisfaction with her representation or engage other counsel. She could not be and was never intended to be the final arbiter of the interests of even one child -- much less a whole class of children.

III.

NEW YORK STATE PROCEDURE VIOLATES THE FOURTEENTH AMENDMENT BY FORCIBLY SEVERING THE FAMILIAL BONDS BETWEEN FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS WITHOUT PROVIDING A PRE-SEPARATION HEARING.

Amici curiae do not ask the Court to assess the legitimacy of State ends in separating foster children from their long term foster parents. *Amici* only argue that the familial bonds, which the Court recognized in *Stanley v. Illinois*, 405 U.S. 645 (1971) as warranting Constitutional protection, cannot be invaded without due process. New York procedures do not satisfy the requirements of due process.

New York procedure empowers partisan administrative officials forcibly to separate a child and his long term foster parents prior to a full evidentiary hearing before an independent decisionmaker. Simply upon ten days notice, an authorized state or private agency can remove children from their long term foster families. Regulations offer no more than an informal conference during the ten day period to foster parents who object to the agency's decision. They are not given access to agency records or permitted to cross-examine witnesses. They have the burden of proving to the agency that its decision to break up their family is wrong without any obligation upon the agency to disclose the grounds for its action.¹⁰ This

¹⁰ N.Y. Social Services Law §383(2); 18 N.Y.C. R.R. §450.10.

failure to satisfy due process is not remedied by the periodic review provisions which go into effect after a child has been in foster care for eighteen months.¹¹ These provisions contain no prohibition against separation of foster children from their foster parents prior to a hearing, either before, during or after the review. For example, a foster child whose case review in January results in a decision to leave him with his foster parents may be removed from that same foster family in March of the same year simply by agency edict.

New York procedure does not satisfy the standards for due process elaborated in *Mathews v. Eldridge* — U.S. —, 96 S.Ct. 893 (1976). There the Court set forth three distinct factors which must be considered in determining the specific dictates of due process:

“ . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*, at 903.

Application of these factors to this case inevitably leads to the conclusion that long term foster families have a constitutional right to a pre-separation hearing “closely approximating a judicial” proceeding. *Id.*, at 902.

¹¹ N.Y. Social Services Law §392.

A. The Liberty Interest In The Familial Bond Cannot Be Fully Protected By Post-Separation Hearings.

The private liberty interest at stake cannot be fully protected by post-separation hearings or by subsequent judicial review. To be a child is to be in a crucial and dependent phase of human growth in which primary relationships cannot be turned off and on again without damage. An erroneous wrenching of the nurturing bonds between the long term foster child and his long term foster family is the kind of damage that is not fully -- or even substantially -- recompensable even by ordering a resumption of the broken relationships. In terms of irreparable injury, an erroneous breaking up of delicate and complex long term foster family relationships is far more serious than would be such an unthinkable action as, for example, an agency intentionally breaking a child's arm for some therapeutic purpose, recognizing that such a mistake may be “corrected” by resetting the limb which, though scarred, may grow together again as “strong” as it ever was. Unlike the disability benefits in *Mathews* -- unlike most private *property* interests affected by official action -- the private *liberty* interests of child and parent to be secure in their relationship can never be fully restored by retroactive relief. *Amici* find it difficult to conceive of any more consequential deprivation than the forced separation of a child from the adult persons upon whom he has grown to rely.

B. The Risk Of Erroneous Severing Of The Familial Bond Is High

The risk of an erroneous deprivation of the liberty

interests at stake is high because the existing pre-separation procedure is unreliable and unfair. By replacing present procedure with a prior hearing the Court can greatly decrease that risk for children and their long term foster parents.

Unlike the decision to terminate disability benefits at issue in *Mathews*, the decision to separate the long term foster child from his long term foster family and the equally significant decision of placing the separated child are neither "sharply focussed [nor] easily documented." *Mathews v. Eldridge*, ___ U.S. ___, 96 S.Ct. 893, 907 (1976). Indeed, New York State acknowledges that "the decisions of the foster care agency [are] rendered on the most intangible, complex and non-quantifiable grounds."¹² As in *Goldberg v. Kelly*, 397 U.S. 297 (1970), distinguished by the *Mathews* Court, a wide variety of information, including the testimony of the foster parents themselves, may be deemed relevant, and conflicting professional views "often are critical to the decisionmaking process." *Id.*, at 907.

Amici recognize that there is considerable disagreement as to what the standards are for separating foster children from their long term foster parents, but no matter what the standards, their application involves difficult and subtle questions. The complexity of the questions increases the likelihood of error. The plight of foster children and biological and foster parents, and the grave risk of violations to their liberty interests in the present "act-first-and-decide-later-whether-it-was-right" procedure, are highlighted by

¹²Jurisdictional Statement of Appellants-Defendants, Bernard Shapiro, etc., dated August 6, 1976, 15.

the Temporary (N.Y.) State Commission on Child Welfare in its 1976 Annual Report *The Children of the State II*. The Commission concludes: "What we are dealing with is an intake and treatment lottery produced by the absence of clear uniform standards governing children in need of care services." *Id.*, at 18. Minimally, due process, in accord with *Mathews*, mandates a full pre-separation hearing by an independent decisionmaker.¹³

C. Pre-Separation Hearings Are Not In Conflict With The Public Interest.

In *Mathews* and in the cases on which it relies the public interest is a significant factor in assessing state

¹³The high risk of violations to liberty interests in New York practice is apparently not uncharacteristic of the plight facing long term foster families generally. Professor Mnookin in *Child Custody Adjudication: Judicial Function in Face of Indeterminacy*, 39 Law and Contemp. Prob., No. 3, 226, 273-274 (Summer 1976) writes:

"The existing legal framework for foster care does not prevent the convenience of the social-welfare system, rather than the interests of the child, from being the primary motivating factor. Social workers, their supervisors, and juvenile court judges lack the time and energy (given substantial case loads) to make careful individualized determinations of what would be best for a child. Instead, these state officials apply unarticulated rules of thumb. Many decisions are made because of organizational considerations having nothing to do with the interests of the child. In all events, because virtually any conclusion can often be justified under the vague rubric of best interest, there is no necessity for these officials to specify either their value judgments, their psychological hunches, or the organizational consideration underlying their rules of thumb."

procedures. This interest appears, in large part, to be concerned with incremental financial costs to the state of the due process safeguards being sought. But, even where only property interests are at stake, "[F]inancial cost alone is not a controlling weight." *Mathews v. Eldridge*, ____ U.S. ____, 96 S.Ct. 893, 909 (1976). Where, as here, the liberty interest in the familial bond is in jeopardy, the Court, in *Stanley v. Illinois*, 405 U.S. 645, 656 (1971), emphasized:

"[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (footnote omitted).

Actually, in this case, there is no conflict between the human and financial goals that comprise the public interest factor. Both will be served by assuring due process.

The requirement of full pre-separation hearings should act as an incentive to keep children with their biological families rather than place them in more costly indeterminate foster care in the first place. The State argues: "In the future, mothers will be much more hesitant to utilize the foster care system at all, even in the worst of personal difficulties. The risk of losing a child forever once in foster care will encourage them to seek temporary, if less satisfactory,

solutions outside the formal foster care system."¹⁴ If the State's prediction is correct, the total number of children in costly long-term "temporary" foster care will be reduced as will the financial burden on the state. More important, the public interest would be furthered because funds would be released to provide supportive services for poor and minority families at risk, rather than continue to be used to force their dismemberment in unwarranted neglect proceedings.¹⁵

¹⁴Jurisdictional statement of Appellants-Defendants, Bernard Shapiro etc., dated August 6, 1976, 24-25.

¹⁵A study undertaken by the New York State Board of Social Welfare, in conjunction with the New School for Social Research, entitled *Foster Care Needs and Alternatives to Placement: A Projection for 1975-1985*, "found that many children placed outside their homes could have stayed home, or could have returned home at an earlier time with a better likelihood of remaining there, if appropriate supportive services had been available." Quoted in Temporary (N.Y.) State Commission on Child Welfare, 1976 Annual Report, *The Children of the State II*, 9-10.

In a 1975 report prepared by the State Board of Social Welfare entitled *Foster Care Needs and Alternatives to Placement: A Plan For Action . . .* it was noted that "[T]he lack of funding for community-based preventive and supportive services for families at risk has often led to the inappropriate entry of many children into the foster care system." (p. 3).

"Since 1970, black and Puerto Rican children have accounted for more than 75% of the total New York City foster-care population. Catholics and Protestants are almost equally represented and together, accounted for over 95% of the total caseload in 1974. Whereas the percentage of all New York City children in foster care has been increasing, a black child is three times, and a Puerto Rican child more than twice as likely as a white child to be removed from his family." T. Lash and H. Sigal, *State of the Child: New York City* (Foundation for Child Development, 1976), 61. (references to appendix omitted).

or in so-called "voluntary" placements under the threat of neglect proceedings and with the false hope that foster care will really be temporary.¹⁶ "So long as foster care is expected to be and is in fact temporary in theory only, it can be, as it has become, a legal fiction for destroying families, especially poor ones."¹⁷ To assure, particularly minority families, whose children are the largest users of foster care, that the state has an incentive to make foster care truly temporary, the due process sought here would not only encourage the state to return children to their biological parents before the expiration of the critical year, but it would give the state an incentive to cease using foster care "as an almost knee-jerk reaction threatening family crises."¹⁸

¹⁶For example, intervenor appellant Dorothy Nelson Shabazz was accused of neglecting her five children. "She was told that if she placed her children, for three months, [in foster care] no court action would be taken." Jurisdictional Statement of Appellants-Intervenors, Naomi Rodriguez, etc., dated Aug. 9, 1976, p. 8. "After she secured counsel, a neglect proceeding was brought against her and was dismissed . . ." *Id.*, at 8, fn.

¹⁷Goldstein, *Why Foster Care - For Whom And For How Long?* 30 *supra* at 657. The Psychoanalytic Study of The Child, 647, 657 (1975).

¹⁸Temporary (N.Y.) State Commission On Child Welfare, 1975 Annual Report, *Children Of The State*, p. 24. And see J. Goldstein, *Why Foster Care - For Whom And For How Long?*, *supra* at 658: "Clarification that the purpose and the expectation of . . . foster care [is] to preserve the family relationships for child and adult parents and that it must be temporary should prompt at the time of [possible intake] a realistic evaluation of the circumstances which suggest consideration of foster care and of the opportunities for its effective implementation. Recognition, for example, that the circumstances which justify foster care are more chronic than acute and that the probability of long-term separation is very high should force renewed consideration of supportive resources for keeping the family intact."

As for administrative costs, New York State's overall financial burden will be lessened, not increased, by providing long-term foster families an opportunity for full pre-separation hearings. The expense of a fair hearing is the same whether held before or after separation. The State's prediction of more hearings must be balanced against a decrease in the number of hearings resulting not only from State-predicted decreases in the "voluntary" use of long term foster care, but also from a decrease in unwarranted State action to dismember biological and long term foster families. To the extent separation results in the foster child being placed in another foster home, the financial cost is either the same, or in some cases greater, since, under the present procedure, the administrative cost of at least two moves is incurred for each erroneous determination. To the extent that placements are to institutions, the cost of the current procedure is from two to five times the cost of leaving the child with his foster family pending a final determination.¹⁹ In the event of erroneous separations there would again be the administrative costs of two unnecessary moves. To the extent a child is returned to his biological parents, there is some saving to the State in the current procedure pending final determination. However, placement back to the biological parents occurs in a minority of instances and again the State must bear the additional cost of two unnecessary moves when such decisions are found to be erroneous.

¹⁹Temporary (N.Y.) State Commission on Child Welfare, 1975 Annual Report, *Children Of The State*, 27.

D. The Proposed Exception To *Mathews* Is Untenable.

Application of the three *Mathews* factors make manifest that the claimed right of New York State to break up long term foster families without reviewable standards and without a prior evidentiary hearing before an independent decisionmaker "immediately collides with the requirements of the Constitution." *Goss v. Lopez*, 419 U.S. 565, 575 (1975).

The State argues for an exception to *Mathews* based on its claim that "[T]he absence of antagonism between the agency and child sharply distinguishes the foster care transfer situation from the usual context in which this Court has found cognizable Fourteenth Amendment interests."²⁰ This argument is specious. It fails to recognize that "constitutional values are called into question whenever the state professes to act with children in the role traditionally taken by parents in this society."²¹ It fails to comprehend the difference between the *concept* of impersonal parenthood as exemplified by the state and the *actuality* of parenthood as exemplified by caretaking biological or foster parents. Unlike the human parent, the state,

²⁰Jurisdictional Statement of Appellants-Defendants, Bernard Shapiro, etc., dated August 6, 1976, 14-15.

²¹Burt, *Developing Constitutional Rights Of, In And For Children*, 39 Law & Contemp. Prob., No. 3, 118, 137 (1975).

as parent, cannot be entrusted to make crucial decisions as to a child's disposition without procedural due process.²²

Both the 1975 and 1976 Annual Reports of the Temporary (N.Y.) State Commission On Child Welfare demonstrate, not a coincidence, but an *inherent* conflict of interest between agency and the individual foster child. The fact (as opposed to the State's self-serving fantasy) is that the New York system has too often failed to serve a child's best interest, which is to ensure for it a permanent, family relationship. It has failed by taking inadequate steps to prevent the break-up of biological families. It has failed by leaving

²²The notion that juvenile delinquency proceedings were "civil," not criminal, and, therefore, not subject to due process also rested on the *parens patriae* doctrine which the State invokes here to establish the identity of its interest with that of all foster children. The Court in *In Re Gault*, 387 U.S. 1, 17-19 (1967) recognized the inherent limitations on the capacity (and thus the need for limits on the power) of the State to act in *loco parentis* to represent and protect the child as would a responsible, caretaking parent -- whether biological, adoptive or long-term foster:

"Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."

foster children in limbo for years at a time²³ and then separating them, without any prior review, from what is often the only family they have known. In the current New York "system" in which each agency sees itself "as a jealous sovereignty, resisting the encroachments of alien authority"²⁴ only chance, not practice, is likely to provide a "coincidence of interests" between foster-child and agency.

E. What Process Is Due?

Amici believe that procedural justice requires New York to establish a system of pre-separation hearings. *Amici* agree with the District Court that New York should have considerable latitude in designing the system, but at a minimum, *Mathews* requires that the system must contain the following elements: (1) the hearing must precede the termination; (2) the agency must give notice of its proposed action, the grounds for its action and the right to a hearing; (3) prior to the hearing the agency must give the foster parents access to its files; (4) the hearing must be on the record and assure the right of cross-examination and that all interests are adequately represented; and (5) the hearing must be held before an impartial and independent decisionmaker.

²³Even Section 392 of the New York Social Services Law which provides for periodic review of the cases by the Family Court was enacted "over the virtually unanimous protestations of child care agencies and social services officials throughout the State." Temporary (N.Y.) State Commission on Child Welfare, Final Report, *Barriers to the Freeing of Children on Adoption*, 14. (Title IV-B, Research and Demonstration Project, March 1976).

²⁴Temporary (N.Y.) State Commission on Child Welfare, 1976 Annual Report, *Supra*, at 11.

CONCLUSION

New York procedure empowers partisan administrative officials forcibly to separate a child and his long term foster parents prior to their having an opportunity for independent review. Such a deprivation of liberty without process in the conduct of one of the most intimate concerns of an individual's personal life is intolerable and unjustifiable.

The protected interests in this case rest not on a particular theory of human nature but upon the universal experience of humankind. No contractual agreement, no declaration of intent by the State, can preclude the long term foster home from becoming for child and parent the seat of family life. It is beyond the limits of law to prevent the development of those familial bonds between child and his adult caretaker that the Fourteenth Amendment was intended to protect.

The life support system provided children by New York in the form of long term foster parents must not be withdrawn without anything less than careful consideration of the impact of such action upon the child and of the adequacy and availability of other permanent parents. Further, it must be recognized that once a child has been in long term foster care with the same foster family the intrusion is equally great whether the agency's purpose is to place the foster child with other foster parents, with his biological parents, with new adopting parents or in an institution.

It is the process for withdrawing such life-support systems from the child, not the substantive basis for such action, that is in issue here. *Amici* do not argue that New York does not have a proper state purpose. *Amici* argue only that the process must provide, before child and long term foster parent are separated, an opportunity for review by a body more neutral than the agency itself which initiates such actions.

Finally, it should be obvious once said that the violations of due process against children and their biological parents which occur when they are initially separated under state pressures that belie the "voluntariness" of many foster placements must not be used to justify further deprivations of liberty. No child in long term foster care, however poor, should be deprived of constitutional protection a second time to "make up" for a state agency's initial failure to afford due process at intake to the very same child and his biological parents. A child must not be used -- unless such use comports with the child's best interest in accord with state law -- as money or property can be used, to compensate persons for violations of their constitutional rights. To do so is only to compound the error and to be blind to the nature of human relationships and to that liberty interest in the integrity of the family which the Constitution is meant to safeguard.

In sum, it is difficult to conceive of any more consequential deprivation than the forced separation of a child from the adult persons upon whom he has grown to rely. New York practice deprives children and their long term foster parents of their freedom to associate, to live and grow with one another and of the security of their person and of their home, without proof that

such intrusion will serve, as state law requires, the best interests of the child.

For the reasons stated above, the decision of the District Court should be affirmed.

Dated this 15th day of January, 1977.

Respectfully submitted,

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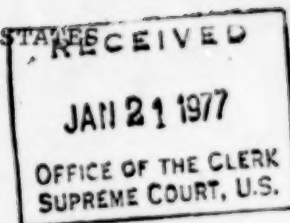
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976



76-180 J. HENRY SMITH, etc. et al.,
-against-
ORGANIZATION OF FOSTER FAMILIES FOR EQUITY AND
REFORM, etc. et al.,
Appellants-Defendants,
Appellees.

76-183 BERNARD SHAPIRO, etc. et al.,
-against-
ORGANIZATION OF FOSTER FAMILIES FOR EQUITY AND
REFORM, etc. et al.,
Appellants-Defendants,
Appellees.

76-5193 NAOMI RODRIGUEZ, etc. et al.,
-against-
ORGANIZATION OF FOSTER FAMILIES FOR EQUITY AND
REFORM, etc. et al.,
Appellants-Intervenors,
Appellees.

76-5200 DANIELLE and ERIC GANDY, etc. et al.,
-against-
ORGANIZATION OF FOSTER FAMILIES FOR EQUITY AND
REFORM, etc. et al.,
Appellants-Plaintiffs,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANTS' JOINT MEMORANDUM IN OPPOSITION TO
MOTION OF A GROUP OF CONCERNED PERSONS FOR
CHILDREN FOR LEAVE TO FILE BRIEF AMICI CURIAE

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IN THE

76-180 J. HENRY SMITH, etc. et al.,

76-183 BERNARD SHAPIRO, etc. et al.,

76-5193 NAOMI RODRIGUEZ, etc. et al.,

76-5200 DANIELLE and ERIC GANDY, etc. et al.,

ON APPEAL FROM THE UNITED STATES

APPELLANTS' JOINT MEMORANDUM IN OPPOSITION TO

Appellants-plaintiffs Danielle and Eric Gandy, et al.,

of amicus curiae briefs, the application in this instance, which

POINT I

AN AMICUS CURIAE BRIEF MAY NOT BE

An attempt by witnesses testifying for a party* to

Nor are movants helped by their assertion that their

* Joseph Goldstein and Albert J. Solnit were witnesses for

** Appendix, pp. 172a, 173a, 181a, 182a, 255a, 258a.

particular psychiatric view, and their testimony must be assessed by this Court on the basis of their lengthy testimony and answers on cross-examination, not in the form of a purported amicus curiae brief.

POINT II

WITNESSES FOR A PARTY CANNOT SUBSEQUENTLY APPEAR AS "FRIENDS OF THE COURT"

Drs. Goldstein and Solnit had no mere tangential involvement in the court below as witnesses on behalf of appellees. Their testimony covers more than 300 pages, and was the basis for appellees' theories and claims about the foster care relationship. The fact that they now call themselves "friends of the court" cannot alter the adversarial and partisan views which they continue to offer. Mr. Justice Frankfurter stated in Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 581 (1946):

"Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome."*

The standing and duties of an amicus have been well defined in the law. Amicus curiae is a Latin phrase for "friend of the court" as distinguished from an advocate before the court. Allen v. County School of Prince Edward County, 28 F.R.D. 358, 362 (E.D. Va., 1961); Clark v. Sandusky, 205 F. 2d 915 (7th Cir. 1953).

* Foster parents generally receive at least \$155.00 per month under their contracts with public or private agencies for the care of each child. Transcript of Record in the District Court, Docket Item No. 84, pp. 87-89.

Indeed, the Canons of Ethics suggest that an attorney cannot be both witness and advocate in a case since the function of counsel is to advance a cause, while that of a witness is to state facts objectively.* Dr. Goldstein is both counsel for all movants, himself a movant, and was a witness for appellees.

It is clear that movants cannot satisfy the criteria for amici curiae. Their involvement with appellees, as witnesses and as members of appellees' Advisory Board,** also places them in a conflict of interest with the children for whom they wish to speak.***

POINT III

THE PROPOSED AMICUS BRIEF ATTEMPTS TO OVERTURN THIS COURT'S DENIAL OF ADDITIONAL COUNSEL TO REPRESENT THE FOSTER CHILDREN

This Court on November 15, 1976, denied a motion by appellees to have additional counsel appointed to represent appellant foster children. The proposed amici wish to speak for the foster children herein, arguing that Helen L. Bittenwieser's appointment as counsel for such children "did not make her their exclusive spokesman" (p. 9). This Court has already ruled adversely on the appropriateness of additional spokesmen.

* American Bar Association Code of Professional Responsibility, Canon 5, EC 5-9, p. 19C.

** Joseph Goldstein, Anna Freud, and Albert J. Solnit are on the Advisory Board of appellee Organization of Foster Families for Equality and Reform (p. iv).

*** The conflict between the foster children and the foster parents was set out in an opinion of the District Court dated December 10, 1974 (appellants' Joint Appendix to Jurisdictional Statements, pp. 61a-68a).

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE
MOTION OF THE GROUP OF CONCERNED
PERSONS FOR CHILDREN FOR LEAVE TO
FILE A BRIEF AMICI CURIAE SHOULD BE
DENIED.

Dated: New York, New York
January 20, 1977

Respectfully submitted,

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